

vol. 2471  
**No. 11631**

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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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**NATIONAL MOTOR BEARING CO., INC., a**  
**Corporation,**  
**Appellant,**  
**vs.**

**CHANSLOR & LYON CO., a Corporation,**  
**Appellee.**

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**Transcript of Record**  
**In Three Volumes**  
**Volume I**  
***Pages 1 to 240***

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**Upon Appeal from the District Court of the United States**  
**for the Northern District of California,**  
**Southern Division**

**FILED**

**AUG 27 1960**

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**PAUL P. O'BRIEN,**  
**CLERK**



No. 11631

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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NATIONAL MOTOR BEARING CO., INC., a  
Corporation,  
Appellant,  
vs.

CHANSLOR & LYON CO., a Corporation,  
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Southern Division





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

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MR. A. W. BOYKEN,  
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San Francisco, California.  
Attorney for Appellee.

On appeal from the United States District Court  
for the Northern District of California, South-  
ern Division.

Decision of Judge Louis E. Goodman.

[Endorsed]: Filed May 15, 1947.

In the United States District Court for the Northern  
District of California, Southern Division

Civil Action No. 23697-G

Suit for Infringement of Letters

Patent No. 2,146,677

NATIONAL MOTOR BEARING CO., INC., a  
corporation,

Plaintiff,

vs.

CHANSLOR & LYON CO., a corporation,  
Defendant.

### BILL OF COMPLAINT

Now comes plaintiff and for its Bill of Complaint alleges:

#### I. Plaintiff

That the plaintiff, National Motor Bearing Co., Inc., is a corporation organized under and existing by virtue of the laws of the State of California, with its principal place of business in the City of Redwood City, County of San Mateo, State of California.

#### II. Defendant

That the defendant, Chanslor & Lyon Co., is a corporation duly organized and existing under the laws of the State of California with a principal place of business in the City and [1\*] County of

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\* Page numbering appearing at foot of page of original certified Transcript of Record.



San Francisco, State of California, and said defendant is a resident and inhabitant of the Northern District of California, Southern Division.

### III. Jurisdiction

1. That the jurisdiction of this Court is based upon the patent laws of the United States of America.

2. That the infringing acts of which complaint is made thereafter were and now are being committed by said defendant in San Francisco, California, in the Northern District of California, Southern Division, and elsewhere in the United States.

### IV. Patent In Suit

1. That on August 5, 1936, Lloyd A. Johnson, being, within the meaning of the United States Statutes then in force, the original, first and sole inventor of a certain "Fluid Seal" and being entitled to a patent therein, under the provisions of the said Statutes, duly filed in the United States Patent Office an application for Letters Patent Serial No. 94,326, which application was duly executed on July 29, 1936.

2. That on February 7, 1939, all of the requirements of the then existing Statutes of the United States and Rules of Practice of the United States Patent Office having been complied with, Letters Patent of the United States No. 2,146,677, were duly granted on said application, which Letters Patent or a certified copy thereof plaintiff will pro-

duce at the trial, or earlier if this Court shall so direct.

#### V. Title to Patent

1. That on July 12, 1938, said Lloyd A. Johnson executed an assignment of all his right, title and interest in and to said application to National Oil Seal Co., a Nevada corporation, which said assignment was recorded in the United States Patent Office [2] on January 12, 1939, in Liber U-177, at page 620.

2. That pursuant to said assignment said Letters Patent No. 2,146,677 was issued to said National Oil Seal Co. on February 7, 1939, which company retained title thereto until it was assigned to plaintiff.

3. That on September 30, 1940, the said National Oil Seal Co. assigned its entire right, title and interest in and to said United States Letters Patent No. 2,146,677, together with all right of recovery for past infringement, to plaintiff National Motor Bearing Co., Inc., which said assignment is now being recorded in the United States Patent Office and plaintiff begs leave to add the date, Liber and page when advised of the same.

4. That copies of the aforesaid assignments are ready to be produced as this Court may direct.

5. That by virtue of these assignments the entire right, title and interest in and to United States Letters Patent No. 2,146,677, together with all rights

for recovery for past infringement, now is vested in the said plaintiff.

## VI. Infringement

That defendant has, within the last six years, and prior to the filing of this Bill of Complaint, and subsequent to the date of said Letters Patent, infringed the same and threatens to continue to so infringe by making, offering for sale, or selling or causing to be sold, and using or causing to be used within this District and elsewhere within the United States, Fluid Seals made by the Victor Manufacturing & Gasket Company in accordance with and embodying the invention disclosed in and claimed in plaintiff's said Letters Patent, wilfully and without the consent of the plaintiff. [3]

## VII. Notice

That the plaintiff has given notice to defendant, but in spite of said notice defendant has infringed and is continuing to infringe, to the substantial and irreparable injury of the plaintiff.

## VIII. Damage

That defendant has derived unlawful gains and profits from such infringements, which plaintiff would otherwise have received but for such infringements and has thereby been caused irreparable damage.

Wherefore, Plaintiff prays:

1. For an injunction restraining the defendant, its officers, agents, servants and employees from

directly or indirectly making or causing to be made, selling or causing to be sold, or using or causing to be used, any ~~gas mixing~~ devices made in accordance with or embodying the invention of said United States Letters Patent No. 2,146,677, or from infringement upon or violating the said Letters Patent in any way whatsoever. [Corrected by stipulation 11-15-44—W. J. C. Deputy Clerk.]

2. For the costs and an accounting of profits and damages.

3. For such other and further relief as the Court may deem meet and just.

A. DONHAM OWEN,  
Attorney for Plaintiff.

Dated: 9/18, 1944.

[Endorsed]: Filed Sept. 18, 1944. [4]

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[Title of District Court and Cause.]

MOTION FOR FURTHER AND BETTER  
PARTICULARS AND EXTENSION OF  
TIME TO ANSWER.

Comes now, the defendant in the above entitled cause and moves the Court for an order requiring plaintiff to file a further and better statement of the nature of its claim and further and better particulars of certain matters stated in its "Bill of Complaint," as follows:



1. State when and where, if at all, this defendant has made fluid seals alleged to infringe the Johnson patent No. 2,146,677.

2. State when and where, if at all this defendant has used fluid seals alleged to infringe the Johnson patent No. 2,146,677.

3. If the answer to the foregoing questions, or either of them, is in the affirmative, produce samples of such fluid seals as have been made and/or used, or clear drawings or other illustrations and descriptions of them, together with any markings by which they may be clearly identified.

4. State when, where and how plaintiff has given notice to the defendant of its alleged infringement, and if given in writing produce and furnish defendant with a copy thereof.

5. Referring to paragraph VI of the "Bill of Complaint," state what date and where defendant is alleged to have commenced the infringement complained of, and furnish defendant with samples or clear drawings or other illustrations and description of the fluid seals, together with any marking by which they may be identified, which are alleged to have been sold by defendant in infringement of the said Johnson patent No. 2,146,677. [5]

In the event the propriety of this motion is questioned, defendant requests permission to present a brief and oral argument in support of it.

Defendant further moves that its time for answer be extended thirty days beyond the date of service upon it of plaintiff's bill of particulars.

Dated October 6th, 1944.

WALLACE R. LANE,  
CARL F. GEPPERT,  
Counsel for Defendant.

A. W. BOYKEN,  
Solicitor for Defendant.

Receipt of a copy of the foregoing motion on this 6th day of October, 1944, is hereby acknowledged.

A. DONHAM OWEN,  
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 6, 1944. [6]

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[Title of District Court and Cause.]

### BILL OF PARTICULARS

Now comes the plaintiff and files this its bill of particulars, without prejudice to their correction, enlargement or change, if error be found:

#### Particular No. 1

Upon information and belief, plaintiff states that defendant has had the fluid seals, charged to infringe, made by Victor Manufacturing and Gasket Company within the six-year period before the filing of the Bill of Complaint herein.

Particular No. 2

Upon information and belief, plaintiff states that defendant has itself used locally and has caused others to use [7] fluid seals charged to infringe, within the six-year period before the filing of the Bill of Complaint herein.

Particular No. 3

Attached hereto and marked "Plaintiff's Exhibit 1" are illustrations of devices typical of those charged to infringe.

Particular No. 4

Oral notice was given an officer of defendant in San Francisco before the suit was filed, and written notice was given this defendant in the Bill of Complaint.

Particular No. 5

Plaintiff is not advised as to when defendant commenced the infringement complained of; furthermore that is a matter better known to defendant. The balance of the information sought in Request No. 5 is set forth in Plaintiff's Exhibit No. 1 attached hereto.

Dated November 10, 1944, San Francisco, Calif.

A. DONHAM OWEN,  
Counsel for Plaintiff.

A copy of this Bill of Particulars was served on Messrs. Boyken, Mohler and Beckley, Counsel

for defendant by mailing a copy to their offices in the Crocker Building, San Francisco.

A. DONHAM OWEN.

(Here follows Plaintiff's Exhibit No. 1.)

[Plaintiff's Exhibit No. 1 appears in Book of Exhibits.]

[Endorsed]: Filed Nov. 11, 1944. [8]

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[Title of District Court and Cause.]

### STIPULATION

It is hereby stipulated and agreed between counsel for the parties that the following typographical errors in the Bill of Complaint may be corrected by the Clerk:

On page 4, in the first paragraph of the prayer, line 4, strike out the words "gas mixing"; and in line 6 of the same paragraph, correct the number of the patent to read 2,146,677.

Dated November 10, 1944, San Francisco, Calif.

A. DONHAM OWEN,

Counsel for Plaintiff.

A. W. BOYKEN,

Counsel for Defendant.

[Endorsed]: Filed Nov. 15, 1944. [9]



[Title of District Court and Cause.]

ANSWER

I.

Defendant has no knowledge as to the corporate organization or existence or place of business of plaintiff, and therefore demands proof of same.

II.

Defendant admits that it is a corporation organized and existing under the laws of the State of California with a principal place of business in the City and County of San Francisco, State of California, and is a resident and inhabitant of the Northern District of California, Southern Division.

III.

(1) Defendant admits that the jurisdiction of this court is based upon the patent laws of the United States of America.

(2) Defendant denies each and every of the allegations contained in paragraph 2 of section III of the Bill of Complaint [10] in manner and form as therein set forth.

IV.

(1) Defendant denies each and every of the allegations contained in paragraph I of section IV of the Bill of Complaint, and specifically denies that on August 5, 1936, Lloyd A. Johnson, being, within the meaning of the United States Statutes

then in force, the original, first and sole inventor of a certain "Fluid Seal" and being entitled to a patent thereon.

(2) Defendant denies each and every of the allegations contained in paragraph 2 of Section IV of the Bill of Complaint.

## V.

Defendant, upon information and belief, denies the allegations of paragraph 1, 2, 3, 4 and 5 of section V of the Bill of Complaint concerning plaintiff's alleged title to or rights of recovery under the Johnson patent No. 2,146,677, and demands immediate production of any documents upon which plaintiff will rely for its alleged title.

## VI.

Defendant denies each and every allegation contained in section VI of the Bill of Complaint, and specifically denies that defendant has within the last six years, and prior to the filing of the Bill of Complaint, and subsequently to the date of said Letters Patent, infringed said patent and threatens to continue to so infringe by making, offering for sale, or selling or causing to be sold, and using or causing to be used within this District or elsewhere within the United States, any Fluid Seals which infringe the said Johnson patent No. 2,146,677. Defendant denies that it has ever manufactured any Fluid Seals or made any devices of the kind described and claimed in the patent in suit, whether as infringement thereof or otherwise.

## VII.

Defendant denies each and every allegation of section VII of the Bill of Complaint and specifically denies that plaintiff [11] gave defendant any notice of infringement of the Johnson patent asserted prior to the filing of the Bill of Complaint or that defendant has at any time infringed said Letters Patent No. 2,146,677 or has threatened so to do.

## VIII.

Defendant denies each and every allegation contained in section VIII of the Bill of Complaint, and specifically denies that defendant has derived unlawful gains and profits from such alleged infringements, which plaintiff would otherwise have received but for such alleged infringements.

## IX.

Defendant further answering charges and alleges that the said Letters Patent No. 2,146,677 issued February 7, 1939, on the application filed August 5, 1936 and the claim thereof, are void and of no force and effect in law because the alleged invention and improvement claimed to be therein described, disclosed and claimed, have been long prior to the alleged invention or discovery thereof by the Johnson, or more than two years prior to his alleged application for said patent, patented, described and fully disclosed to the public in various patents and printed publications in the United States and foreign countries; that the said Johnson

was not the original, first and true inventor or discoveror thereof, or of any material or substantial part of the Fluid Seal claimed to be patented in said patent, but that the same had been in public use and on sale in this country for more than two years prior to Johnson's application for said patent: and that each and every part thereof had been invented, discovered, used by or known to others in this country and elsewhere before the alleged invention, discovery or appropriation thereof by Johnson. Defendant further charges and alleges that in view of the prior art existing at the time, there was no invention in what said Johnson claims to have invented.

The following patents, names of parties mentioned in said patents and the owners thereof, with the addresses there given and elsewhere, printed publications, prior users, inventors, [12] discoverors and those having prior knowledge of the alleged invention, with their addresses which are also the places where the uses occurred and the knowledge and the discoveries had and the work done, are among those supporting these defenses, and to which defendant makes reference and gives notice, to wit:

1,040,308	Godley, October 8, 1912
1,740,929	Loock, December 24, 1929
1,905,800	Chandler, April 25, 1933
1,938,746	Fitzgerald, December 11, 1934
2,013,333	Anderson, September 3, 1935
2,052,762	Gits, September 1, 1936

2,071,403	Heinze, February 23, 1937
2,089,461	Winter, August 10, 1937
2,114,908	Peterson, April 19, 1938
2,116,240	Heinze, May 3, 1938
1,817,095	Penick et al, August 4, 1931
1,862,153	Lee, June 7, 1932
1,996,210	Lord et al, April 2, 1935
2,004,669	Miller, June 11, 1935

## X.

Defendant, further answering, charges and alleges that said patent and the claim thereof are invalid and of no force and effect in law for the following reasons:

(a) Because they are totally lacking in patentable novelty and invention;

(b) Because they involved nothing more than ordinary mechanical and engineering skill and practice, not amounting to invention:

(c) Because the claim is vague, ambiguous, indefinite and inaccurate, and fails to point out and distinctly claim the part, improvement or combination claimed by Johnson as his invention or discovery.

## XI.

Defendant further avers that continuously since long prior to the issuance of the Johnson Patent it has continuously and extensively sold Fluid Seals in San Francisco and adjacent areas where they have been in use during all that time, and that plaintiff and its predecessor in title to the Johnson



patent have been thoroughly familiar with such sale and use without asserting any charge of infringement of this patent until the [13] filing of this Bill of Complaint; wherefore, plaintiff is now barred from asserting any charge of infringement of said patent against the Fluid Seals here charged to infringe.

## XII.

Defendant, upon information and belief, further alleges that the Fluid Seals of the patent in suit were never made, sold or used, to any substantial extent, if any, by the plaintiff or its predecessor in title.

## XIII.

Defendant denies that plaintiff is entitled to any of the relief sought and prayed for in the Bill of Complaint; denies plaintiff's right to injunction, preliminary or perpetual, or any accounting for profits and damages, or that there has been any infringement; defendant further denies that plaintiff has any rights or is entitled to costs or any other and further relief; and prays that the Bill of Complaint be dismissed for want of equity at the cost of plaintiff.

Dated December 7, 1944.

WALLACE R. LANE

CARL T. GEPPERT

Counsel for Defendant

A. W. BOYKEN

Solicitor for Defendant

Receipt of a copy of the foregoing answer on this 7th day of December, 1944, is hereby acknowledged.

A. DONHAM OWEN

Counsel for Plaintiff

(Endorsed): Filed Dec. 8, 1944. [14]

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District Court of the United States, Northern  
District of California, Southern Division

No. 23697 G

NATIONAL MOTOR BEARING CO., INC.  
a corporation

vs.

CHANSLOR & LYON CO., a corporation

NOTICE

To A. Donham Owen, Esq., 2110 Mills Tower,  
San Francisco 4, California; and A. W. Boy-  
ken, Esq., 723 Crocker Building, San Francisco  
4, California.

You Are Hereby Notified that on January 8,  
1945, the above-entitled case will appear on the Law  
and Motion calendar of Judge Louis E. Goodman to  
be set for Trial.

San Francisco, California

December 12, 1944.

C. W. CALBREATH

Clerk, U. S. District Court

[Title of District Court and Cause.]

AFFIDAVIT RE MOTION FOR SETTING

A. Donham Owen, being duly sworn, deposes and says that he is attorney for plaintiff in this case;

That the purpose of this affidavit is to show the reason for plaintiff's request that this case go off calendar;

That the original filing of this suit was held up by the war, because about ninety-five per cent (95%) of plaintiff's production has been for war use, and the time of plaintiff's engineers and officers to carry through this litigation could not be diverted from the war effort; [16]

That the plaintiff authorized filing this suit on September 18, 1944, when the statements coming out of Washington indicated there would be an end to the European war before the year was out and that there would then follow quickly a substantial re-conversion of war industries to civilian production;

That it was because of these statements that the suit was begun at that time;

That the slow-up in the European war and enlarged war orders have resulted in increased war manufacturing burdens for plaintiff and its engineers and officers, so that time cannot be taken presently to prepare and try this case; and

That as soon as the war orders in plaintiff's plant are cut down, as it was indicated by Wash-



ington officials last fall was to be expected, plaintiff then is most anxious to try this case.

A. DONHAM OWEN,  
Attorney for Plaintiff.

Subscribed and sworn to before me this 5th day of January, 1946.

[Seal]     /s/ ALFRED D. MARTIN,  
Notary Public in and for the City and County of  
San Francisco.

[Endorsed]: Filed Jan. 8, 1945. [17]

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District Court of the United States, Northern  
District of California, Southern Division

No. 23697 G

NATIONAL MOTOR BEARING CO.

vs.

CHANSLOR & LYON CO.

NOTICE

To A. Donald Owen, Esq., 2110 Mills Tower, San Francisco 4, California; and A. W. Boyken, Esq., 733 Crocker Building, San Francisco 4, California.

You are hereby notified that on November 7, 1945, Judge Louis E. Goodman ordered the above entitled case continued from December 11, 1945 to January 22, 1946 for trial.

C. W. CALBREATH,  
Clerk, U. S. District Court.

San Francisco, November 7, 1945. [18]

[Title of District Court and Cause.]

NOTICE UNDER U. S. CODE TITLE 35, SEC. 69

To National Motor Bearing Co., Inc., a corporation,  
Plaintiff, and A. Donham Owen, its attorney:

Please take notice that at the trial of this suit defendant, in addition to the United States Patents set forth in Paragraph IX of the Answer on file herein, intends to rely on the following United States Patents:

1,617,587 Frumveller, February 15, 1927.

2,000,341 Larsh, May 7, 1935.

2,094,160 Oldberg, September 28, 1937.

This notice is given pursuant to U. S. Code Title 34, Sec. 69, formerly R. S. Sec. 4920.

GEORGE I. HAIGHT,  
CARL F. GEPPERT,  
A. W. BOYKEN,  
Counsel for Defendant.

San Francisco, California.

Dated: December 19, 1945.

Receipt of a copy of the foregoing Notice admitted this 19th day of December, 1945.

A. DONHAM OWEN,  
Counsel for Plaintiff.

[Endorsed]: Filed Dec. 22, 1945. [19]

[Title of District Court and Cause.]

AFFIDAVIT RE MOTION TO TAKE PROOFS

A. Donham Owen, being duly sworn deposes and says: that he is counsel for plaintiff in the above case and tried the same before this court;

That exhibits 21 and 22 were introduced in evidence as samples of oil seals made and tested by plaintiff in August and September 1935 embodying the invention of the patent in suit;

That upon completion of the test of Exhibit 21 in 1935 it was put in the safe by the witness Johnson and remained there [20] over ten years until removed for the trial of this case in 1946;

That in September 1935 the seal marked Exhibit 22 was sent to affiant and had been in his possession continuously since that date until offered in evidence in 1946 in this case;

That he showed this seal, Exhibit 22 to the Primary Examiner and his assistant in the Patent Office in 1938, and in his presence they carefully examined the seal to see that it conformed substantially to the print Exhibit 23 and to the claim;

That it did so conform in September 1935 and 1938 to affiant's own knowledge;

That at the trial of this case in 1946 over ten years after the making of the seals Exhibits 21 and 22, counsel for defendant pointed out through the witness Johnson that the back of the molded resilient sealing member now projected a few thousandths of an inch beyond the radial plane of the cup bottom;

That to affiant's surprise and without any pleading to support it defendant's brief (pp. 6, 13, 29) attempts to invalidate the Johnson patent in suit on the argument that Exhibits 21 and 22 do not disclose the invention claimed and therefore since defendant's type A and H seals were made and sold prior to the filing date of the Johnson patent, they anticipate the Johnson patent;

That affiant was at a loss to understand how the seals Exhibits 21 and 22 were like the patent in suit when made in [21] September 1935 and in 1938 when shown to the two Patent Office officials, and now, over ten years later, the molded resilient sealing members had changed shape so that the outer radial face projected a few thousandths of an inch beyond the radial plane of the cup bottom;

That investigation since receiving a copy of defendant's brief has disclosed that the molded resilient sealing members on Exhibits 21 and 22 were made of Thiokol synthetic rubber and have changed shape in the intervening years;

That this is due to a phenomenon well known to workers in this art but not realized by affiant heretofore and apparently not realized by counsel for defendant;

That the change in shape which has caused the molded resilient sealing member on Exhibits 21 and 22 to move outwardly a few thousandths of an inch beyond the radial plane of the cup bottom is termed in text books as "cold flow";

That samples of these text book statements are:

“Thiokols have one other outstanding disadvantage which limits their applicability—a tendency to cold flow. Under conditions of instantaneous release they are as resilient as rubber, but when held for any length of time under pressure or load thiokols become distorted and consequently cannot be used in positions where they would encounter prolonged tension or compression.”

Page 133 of Fleck—Plastics—Scientific and Technological (1945). [22]

“Thioplasts and Cold Flow. As already indicated the great snag which has checked the progress of this class of synthetic rubbers is the cold flow. Under any degrees of temperature and pressure for any length of time these materials become distorted. Yet under conditions of instantaneous release they are quite as resilient as rubber. The cold flow is of considerable importance, since it means that the products cannot be used under conditions of tension or compression.”

Barron—Modern Synthetic Rubbers (1943).

That affiant recently had Exhibits 21 and 22 inspected and measured by qualified experts who state unqualifiedly that “cold flow” is the cause of the protrusion now by a few thousandths of an inch of the outer radial face of the molded resilient sealing member beyond the cup bottom and that this “cold flow” has resulted from the compression of the garter spring to which the sealing member has been subjected for over ten years;



That in view of defendant's reliance upon the present appearance of these Exhibits for invalidating the patent in suit it is essential that testimony be introduced in this cause to explain the facts substantially as above stated; and

That the herein motion is made in good faith in furtherance of justice and equity and is not made for delay.

A. DONHAM OWEN,  
Counsel for Plaintiff. [23]

Subscribed and sworn to before me this 18th day of May, 1946.

[Seal] ALFRED D. MARTIN,  
Notary Public in and for the City and County of  
San Francisco, State of California. My Com-  
mission Expires May 16th, 1948.

[Endorsed]: Filed May 21, 1946. [24]

In the United States District Court for the  
Northern District of California, Southern  
Division.

Civil Action No. 236970

Suit for Infringement of Letters Patent No.  
2,146,677.

NATIONAL MOTOR BEARING CO., INC., a  
corporation,

Plaintiff,

vs.

CHANSLOR & LYON CO., a corporation,  
Defendant.

MOTION FOR PERMISSION TO TAKE  
PROOFS AS TO DEFENDANTS UN-  
PLEADED SO-CALLED VICTOR ANTICI-  
PATION.

Now comes the plaintiff above named and in ac-  
cordance with the practice in Courts of Equity  
moves the Honorable Court for an order permitting  
it to take by deposition or in open court testimony  
relating to important facts in regard to an alleged  
defense, which was not pleaded in defendant's  
answer, and which is mentioned for the first time  
in defendant's brief at pages 6, 13, 29. [25]

The substance of this alleged defense is that the  
Johnson patent in suit is valid on the ground that  
the defendant's Type A and H seals have been  
made and sold prior to the filing date of the John-  
son patent. This defense is based in defendant's

brief on the argument that plaintiff's Exhibits 20 and 21, the early embodiments of the Johnson invention, allegedly do not disclose the invention claimed in the Johnson patent.

Investigation since receipt of defendant's brief has disclosed that Exhibits 21 and 22, being like the seals of the patent in suit and made by plaintiff in 1935, about eleven years before the trial, have had the synthetic sealing member change shape over what it was at the time when the seals were originally made and tested and shown to the Patent Office, and that this change in shape now relied on by defendants, has in fact been caused by a characteristic of the particular Thiokol material employed and known in the text books and to rubber authorities as "Cold Flow."

Counsel for defendant apparently not realizing the causes for such change in form of the sealing member over the eleven year period, nor having an explanation in the record for said changes, now argues that the invention was not reduced to practice at the time Exhibit 22 was shown to the Patent Office.

The record does not clearly and correctly reflect the true facts as to Exhibits 21 and 22.

Plaintiff asks leave of this Honorable Court for an order permitting plaintiff to take testimony, either in open [26] court or by depositions, as the Court may choose, to set forth the true facts with regard to the nature of the reduction to practice of the invention by Exhibits 21 and 22.

The grounds for this motion are:

That the record is incorrect as it stands;



That the record can be corrected to state properly the true facts;

That no harm will be done to either party by having the true facts before the court;

That to have the true facts will serve justice and will materially affect the result and decision of the case so far as the said alleged defense is concerned;

That defendant's reliance on its brief on this unpleaded defense could not have been foreseen by plaintiff; and

That the only just and speedy and proper manner of deciding this case will be to take further testimony.

On the hearing of said motion plaintiff will rely upon and read from the pleadings and papers on file herein and on the following points and authorities:

Schick Dry Shaver, Inc., et al. v. General Shaver Corp., 26 F. S. 190 (Conn.)

Schlumberger Well Surveying Corporation v. Hilliburton Oil Well Cementing Co., 41 F. S. 345 (Texas).

Rules of Civil Procedure Numbers 1, 15b (last sentence). [27]

A. DONHAM OWEN,  
Counsel for Plaintiff.

Dated: May 18, 1946.

Service of a copy of the above motion acknowledged this 20th day of May, 1946.

A. W. BOYKEN,  
Of Counsel for Defendant.

[Endorsed]: Filed May 21, 1946. [28]

[Title of District Court and Cause.]

## MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO TAKE ADDITIONAL PROOFS

Plaintiff's motion sets forth that it is to take proofs as to a defense which was not pleaded and was mentioned for the first time in defendant's brief. The defense is that the patent in suit is invalid because the accused structures were made and sold in June and July, 1936, prior to the filing date of the patent in suit. The defense is alleged to be based on the argument that the exhibits produced by plaintiff as made in 1935 do not embody the invention of the patent in suit. It is alleged that since receiving defendant's brief, plaintiff has investigated and found that the alleged 1935 seals changed in shape since 1935 and so do not disprove the plaintiff's claim of having completed the invention in suit in 1935.

The motion is supported by an Affidavit of Mr. Owen, counsel for plaintiff. In opposition, reliance is placed upon facts and admissions established in open court at the trial herein.

Six "grounds" for the motion are set forth by plaintiff. We discuss them seriatim:

(1) That the record is incorrect as it stands

The answer to this ground is that it is not true. The belated offer of proof now made by plaintiff will not establish that the record is incorrect. Mr. Owen states in his affidavit, page 2, that he and the Primary Examiner examined the seal, Exhibit 22

“to see that it conformed substantially to the print, Exhibit 23, and to the claim.” The drawing which was before the Patent Office, which appears in defendant’s Exhibit AAA, and which was filed in the Patent Office with Johnson’s affidavit on November 28, 1938, showed the sealing element projecting beyond the rim of the cup. No doubt Exhibits 21 and 22 did at [29] that time conform to that drawing. They do today. As to Mr. Owen’s statement that Exhibit 22 “conformed substantially” to the claim in 1938, we note a remarkable similarity. They doubtless did “conform substantially” but they do not justify the element of the claim of the patent requiring that the molded resilient member at its radial face “lies within the radial plane of the cup bottom where it bends inward to form said offset, whereby said molded material is protected from wear by contact with adjacent moving parts.”

Johnson on testifying was presented with the following questions:

“Q. Will you take this one, the one that has been marked as Plaintiff’s Exhibit 22. I will give you a straight edge. Now, tell me that if after the offset—no, I read from the claim of the Johnson patent in suit, ‘a molded resilient sealing member bonded to both sides of said radial flange at said offset so that its outer radial face lies within the radial plane of the cup bottom where it bends inward to form said offset, whereby said molded material

is protected from wear by contact with adjacent moving parts.' Where is the molded material in reference to the bottom of the cup in the sample that you have in your hand?" (Tr. 254-255.)

And the witness answered:

"A. Well, the inside bottom or outside bottom?

Q. The outside bottom.

A. It is right here.

Q. Put a straight edge on it. What do you say?

A. What do you want me to say?

Q. I want you to say whether the language I have read applies to the structure you hold in your hand? A. Substantially it does."

In passing we note that this work "substantially" is the one also used by Owen in his affidavit. The question and answers then continued:

"Q. By the work 'substantially' you mean that it does not, don't [30] you? That is like things being practically the same, indicating that they are different.

A. I mean this, that in this particular sample there is some rubber protruding, maybe here.

Q. That is not like Type A here accused, is it, where we have this inset?

A. You have the inset all right.

Q. The rubber comes clear out and some-



what beyond the bottom of the cup than the one you hold in your hand?      A. Yes.

Q. So it doesn't come within the claim of the patent in suit, does it, asking you as a patent expert?      A. No." (Tr. 255.)

Continuing at Transcript 255 and 256, Johnson came to the same conclusion in regard to Plaintiff's Exhibit 21.

If the case be reopened and plaintiff produces the "qualified Experts" to whom Mr. Owen refers in his affidavit, page 4, and those experts were to testify that in their opinion "cold flow" caused the sealing member to project beyond the cup bottom, this would still not show the present record in error. The drawing filed in the Patent Office in 1938 showing the sealing element projecting beyond the cup bottom, together with the production of Exhibits 21 and 22 in conformity with that drawing, cannot be refuted by opinions of experts.

(2) That the record can be corrected to state  
property the true facts

The answer to this "ground" is that the record is correct as it stands. Moreover, it is no true ground for reopening a case. Oftentimes an apprehensive litigant will wish to "correct" a record after the evidence is all in. Not only is a real showing required in a proper case, but here the error of plaintiff's showing already appears of record.

(3) That no harm will be done to either party by  
having the true facts before the court

This is based upon an incorrect premise that the

true facts are not now before the court. However, to reopen the evidence, take additional evidence, withdraw briefs, rewrite and reprint briefs would be expensive. Since there is no showing that any different result [31] could be reached were the case reopened, defendant should not be put to the additional expense.

- (4) That to have the true facts will serve justice and will materially affect the result and decision of the case so far as the said alleged defense is concerned

The additional evidence cannot have bearing upon each of the following independently conclusive defenses:

1. Anticipation by the Gits prior public use. (Deft's Brief, pps. 18-20.)
2. Anticipation by the patent to Winter No. 2,089,461, the patent to Fitzgerald No. 1,983,746, the patent to Chandler No. 1,905,800, the patent to Heinze No. 2,071,403, and the patent to Heinze No. 2,116,240 (Deft's Brief, pps. 22-29.)
3. Lack of invention over a plurality of prior art patents. This is shown by the patents themselves, the file history of the patent in suit, and the fact that plaintiff has never made a Johnson seal but instead pays a license fee to a competitor to produce a seal with a leather sealing element. (Deft's Brief, pp. 30-35, 38-42.)

4. Invalidity under Section 4888 of the Patent Act because its elements do not emerge from the specification. (Deft's Brief, pp. 42-45.)
  5. Non-infringement because neither of the accused seals performs the function called for in the claim. (Deft's Brief, pp. 48-50.)
  6. Non-infringement by Type H seal which does not have an axially, inwardly, offset, radial flange. (Deft's Brief, pp. 50-55.)
- (5) That defendant's reliance on its brief on this unpleaded defense could not have been foreseen by plaintiff.

This is plainly in error. Whether pleaded or unpleaded, prior art is admissible to invalidate. Defendant offered evidence, and it was received without objection, to show that the accused [32] seals were manufactured and on sale in June and July of 1936, prior to the filing of the Johnson application (Tr. 175-180, Deft's Ex. AAF, AAG, and AAH). This made it wholly clear that in no event could the claim of the Johnson patent in suit be made to read upon the accused structures and still be held valid. This occurred at the hearing on January 24, 1945. The following day, January 25, 1946, plaintiff sought to meet this by having Johnson produce the alleged 1935 seals, Exhibits 21 and 22 (Tr. 221). On cross-examination defendant brought out that these seals were not within the patent claim (Tr. 255, 256). It thus appeared before plaintiff's rebuttal proofs were



closed and while Johnson was still on the witness stand, that the accused seals were made and sold prior to the filing of Johnson's patent application and that the seals he said he made in 1935 were not within the patent. It was evident at that time that if the accused seals met the claim for the purposes of infringement, they met the claim as prior art and the Johnson patent claim could not be held to be infringed by them.

It is not sufficient that Mr. Owen makes oath that he was surprised. It was nevertheless plainly foreseeable on January 25, 1946 when Johnson was cross-examined, that defendant would urge that the accused seals were prior to Johnson's filing date. If there be surprise in this situation it is that Johnson, on redirect examination, was not asked to and did not volunteer the information that the seals had changed in some way since 1935. It took almost four months for this suggestion to appear in the case.

- (6) That the only just and speedy and proper manner of deciding this case will be to take further testimony

Plaintiff's original brief was due on March 6 (by stipulation extended from February 24). The brief was filed on March 13. Plaintiff's reply brief was due on May 20 and it is not yet filed. Instead the present motion was brought. The just, speedy and proper manner to proceed in the case is to deny the present motion and allow plaintiff one week in which to reply to defendant's brief.

Mr. Owen's affidavit shows that he "was at a loss to understand" that the sealing members projected beyond the radial plane of the cup bottom on Exhibits 21 and 22. The affidavit does not show when this first occurred but it must have been on January 25th when Johnson, on cross-examination, pointed it out. Mr. Owen's affidavit further shows that the investigation upon the basis of which the case is proposed to be reopened, took place some three months later. Ordinary diligence would have suggested prompt investigation. For more than ten years Exhibit 21 was in the possession of Johnson. Exhibit 22 was in the possession of plaintiff's counsel (Affidavit of Mr. Owen, pages 1 and 2). Throughout all of this time, Johnson was familiar with "cold flow" as shown by the patent itself, page 1, lines 51-52 in respect to which he asserts defects in prior structures which his alleged invention would eliminate.

It is respectfully submitted that the motion to reopen should be denied and plaintiff given a short time in which to file a reply brief.

A. W. BOYKEN,  
GEO. I. HAIGHT,  
Counsel for Defendant.

Received a copy of the above and within memorandum this ..... day of May, 1946.

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Counsel for Plaintiff.

[Endorsed]: Filed May 27, 1946. [34]

[Title of District Court and Cause.]

## ORDER REGARDING OPENING OF PROOFS

Upon motion by plaintiff, argued, briefed and submitted on May 27, 1946, the Court being fully advised in the premises, it is hereby Ordered:

1. That permission is hereby given plaintiff to take depositions in Chicago, Illinois, within thirty days from the date hereof, to set forth the true facts with regard to the nature of the reduction to practice of the invention.
2. That permission is hereby given defendant to take any rebuttal depositions in Chicago, Illinois, immediately following those of plaintiff.
3. That Exhibits AAA, 20, 21, 22 and 23 may be temporarily withdrawn by Mr. Owen, counsel for plaintiff, for the purpose of taking said exhibits to Chicago where they are to be open for inspection at the time such depositions are taken, said exhibits to be returned by Mr. Owen to the files of this Court after such depositions are completed.
4. That this suit shall be submitted on July 29, 1946.

LOUIS E. GOODMAN,  
U. S. District Judge.

Dated:

Approved:

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Attorney for Plaintiff.  
A. W. BOYKEN,  
Attorney for Defendant.

Received plaintiff's exhibits 20, 21, 22, and 23,  
and defendant's exhibit AAA.

ROBERT E. WICKERSHAM.

6/3/46 c.c.

Exhibits returned 6/10/46.

ALVIN DASPIT,  
Deputy Clerk.

[Endorsed]: Filed May 29, 1946. [36]

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[Title of District Court and Cause.]

### MEMORANDUM DECISION

The evidence convinces me that the patent in suit does not disclose invention and is anticipated by the prior art. It represents the contribution of the artisan to the art and not that of the inventor. Furthermore the delay in bringing the action prevents the exercise of the equity powers of the Court, assuming they are invocable. There is no need therefore to resolve the issue of infringement and I do not decide it.

The bill of complaint will be dismissed upon Findings of Fact and Conclusions of Law to be submitted pursuant to the Rules.

Dated: September 27, 1946.

LOUIS E. GOODMAN,  
United States District Judge.

[Endorsed]: Filed Sep. 27, 1946. [37]

[Title of District Court and Cause.]

## FINDING OF FACT AND CONCLUSIONS OF LAW

### FINDING OF FACT

1. This is a suit under the patent laws of the United States for infringement of Letters Patent of the United States No. 2,146,677 granted on application of Lloyd A. Johnson.

2. The plaintiff, National Motor Bearing Co., Inc., a California corporation, has been in the business of manufacturing shims since 1922, and has been manufacturing oil seals since October, 1930.

3. The defendant, Chanslor & Lyon Co., a California Corporation, operates sixteen stores in California, selling automobile merchandise of all kinds.

4. The plaintiff is the owner of United States patent to Johnson No. 2,146,677 and is entitled to sue for infringement thereof.

5. Oil seals, sold by the defendant and manufactured by the Victor Manufacturing & Gasket Co., Plaintiff's Exhibits 6 and 7, known as Type A and Type H respectively, are charged to infringe the Johnson patent.

6. The single claim of the Johnson patent is limited to an oil seal comprising a cup member and a sealing member. The cup member is one "having a peripheral portion and an axially inwardly offset radial flange." The sealing member is defined as a "molded resilient" one. The claim specifies that the sealing member be "bonded to both sides of



said radial flange at said offset so that its outer radial face lies within the radial plane of the cup bottom where it bends inward to form said offset, whereby said molded material is protected from wear by contact with adjacent moving parts." [38]

7. Prior to the filing of the Johnson application on August 5, 1936, and prior to an alleged reduction to practice by Johnson in 1935 oil seals comprising a cup member and a molded resilient sealing member were old.

8. The crowded state of the fluid seal art is shown by the Johnson File Wrapper and contents, by the prior art patents introduced in evidence, and by admission of the plaintiff.

9. Beginning in 1933 Remi J. Gits, worked with the B. F. Goodrich Rubber Co. and the Spicer Manufacturing Corp. to develop a sealing member of synthetic material for use with a cup member having a peripheral portion and an axially inwardly offset radial flange. Difficulty was encountered due to the then unperfected material, Koroseal, which was used. Various samples were made, some of which were not satisfactory when tested. Several samples were made, some of which were not satisfactory when tested. Several samples were tested by installation in shock absorbers by the Spicer Manufacturing Corp., subjected to 4,000,000 to 5,600,000 reciprocating strokes and found "okeh." At least one seal was installed in an automobile. By April 16, 1934, the Gits Oil seal was reduced to practice.

10. The structure of the Gits seal is shown by the Gits patent No. 2,052,762 issued on Sept. 1, 1936, on application filed December 17, 1935.

11. The Gits seal was an oil seal of the type adapted for insertion to seal the annular space between the shaft and a bore in a housing.

12. The Gits oil seal, reduced to practice in 1934 and described in patent application filed Dec. 14, 1935, had a cup member having a peripheral portion and an axially inwardly offset radial flange, described in the Gits specifications as a "cup shaped cylindrical shell having an inwardly extending [39] flange at one end." Gits described the axially inwardly offset portion of the flange as follows: "the inner margin of the flange 2 \* \* \*, is offset inwardly as at 4, . . . the offset portion 4 extending in a generally radial direction."

13. The Gits Oil Seal had a molded resilient sealing member, described by Gits as "preferably moulded from a suitable flexible material such as synthetic rubber or the like."

14. The Gits Oil Seal had the sealing member bonded to both sides of the radial flange at the offset so that its outer radial face lay within the radial plane of the cup bottom where it bent inward to form the offset. Gits secured this bond by expanding a clamping ring outwardly, forcing the sealing member against the edge of the offset portion of the cup flange and causing a portion of the sealing member to be extruded over the edge so as to overlap the offset portion. The sealing member and

clamping ring were flush with the end face of the cylindrical cup member.

15. The record shows that in no oil seal of the type here involved could a portion of the cup member protect the sealing element, or the material of which it is made, from wear by contact with adjacent moving parts, for an appreciable period of time; because the resulting wear on the cup member would cause failure of the seal. To the extent that the cup member of the Johnson patent might perform this function, the cup member of Gits could likewise perform the function. The Johnson specification does not mention this function. Gits specification states, "when the seal is inserted in a housing it may flatly abut the inner end of the housing or any other means that might come into engagement with the seal when it is in operative position."

16. The Johnson patent No. 2,146,677 is anticipated by the prior public use and prior knowledge of the Gits seals and is invalid. [40]

17. Plaintiff's Exhibits 21 and 22 are oil seals which were made by Harold Klein, an employee of plaintiff, in the late summer or fall of 1935. These exhibits do not come within the claim of the Johnson patent. After briefs of both parties were filed, proofs were reopened and plaintiff called one witness who testified that, as made, the exhibits came within the patent claim. He identified five drawings as having been made in 1935 and as disclosing the invention.

18. The sealing elements in Plaintiff's Exhibit 21 and Plaintiff's Exhibit 22 were made of a material known as Thiokol which had such a tendency to cold flow that it was not operable in an oil seal.

19. Plaintiff's Exhibit 21 and other seals were subjected to tests in a laboratory in 1935. In the course of these tests, no adjacent moving part touched the oil seal being tested except the shaft which projected through it. Details of the test were not proved. The tests did not establish that the seals could perform their intended function under service conditions. The tests were not sufficient to constitute a reduction to practice.

20. The plaintiff failed to prove any reduction to practice prior to the constructive reduction to practice by the filing of the Johnson patent application on August 5, 1936.

21. Gits Patent No. 2,052,762 for which application was filed on December 14, 1935, is prior art as to the Johnson patent and anticipates the Johnson patent.

22. The accused type A oil seals, Plaintiff's Exhibit 6, were offered for sale in June, 1936 and first sold in July, 1936, prior to the filing of Johnson's patent application. The record does not show during what period the defendant offered them for sale. Their manufacture was discontinued in the latter part of 1939. [41]

23. The accused type H oil seals, Plaintiff's Exhibit 7, were offered for sale in July, 1936, prior to the filing of Johnson's patent application, and



were first sold in November, 1936. The record does not show during what period the defendant offered them for sale.

24. Johnson Patent is anticipated by the prior knowledge and prior public use of seals made by the Victor Manufacturing and Gasket Company known as types A and H the accused structures herein exemplified by Plaintiff's Exhibits 6 and 7.

25. In the oil seal art and in the Johnson patent to bond the sealing element to the metal cup member means merely to unite them firmly by any means.

26. Prior to Johnson, bonding by use of an adhesive, by clamping, and by molding or vulcanizing with or without perforations in a flange in the cup member, were known equivalents and were treated as equivalents in the Johnson specification.

27. The Winter Patent No. 2,089,461 for which application was filed September 18, 1933, disclosed a sealing element bonded to a flange on the cup member by clamping. This is the equivalent of bonding to both sides of a radial flange at an offset. The Winter patent disclosed every element of the Johnson patent or its equivalent and anticipates the Johnson patent.

28. The Fitzgerald Patent No. 1,983,746 issued December 11, 1934 disclosed a sealing element bonded to a flange on the cup member by clamping. This is the equivalent of bonding to both sides of a radial flange at an offset. The Fitzgerald patent



disclosed every element of the Johnson patent or its equivalent and anticipates the Johnson patent.

29. The Chandler Patent No. 1,905,800 issued April 25, 1933, disclosed a sealing element bonded to a flange on the [42] cup member by clamping. This is the equivalent of bonding to both sides of a radial flange at an offset. The Chandler patent disclosed every element of the Johnson patent or its equivalent and anticipates the Johnson patent.

30. The Heintz Patent No. 2,071,403 application for which was filed April 9, 1934, disclosed a sealing element bonded to a flange on the cup member by clamping. This is the equivalent of bonding to both sides of a radial flange at an offset. The Heintz Patent disclosed every element of the Johnson patent or its equivalent and anticipates the Johnson Patent.

31. The Heintz Patent No. 2,116,240, for which application was filed August 30, 1933, disclosed a sealing element bonded to a flange on the cup member by clamping. This is the equivalent of bonding to both sides of a radial flange at an offset. The Heintz Patent disclosed every element of the Johnson patent or its equivalent and anticipates the Johnson patent.

32. The Plaintiff, the second largest producer of oil seals in the United States and the Chicago Rawhide Company, the largest producer of oil seals in the United States, both manufacture under a patent owned by the Chicago Rawhide Company and neither have produced any seals commercially under the Johnson patent.

33. The Johnson patent has received no tribute from the industry. Two months after the Johnson patent issued, the Plaintiff offered it for sale to the Victor Manufacturing & Gasket Company which suggested \$1500 or \$2000 as its "nuisance value." Plaintiff's president rejected this suggestion, stating that he preferred to hold the patent "for trading purposes."

34. The disclosure of the Johnson patent represents at most the contribution expected of one skilled in the art.

35. The Johnson patent is invalid for lack of invention over the prior art. [43]

36. The accused structures were on sale beginning in the summer of 1935. The plaintiff admitted knowledge of them as early as 1937. In February 1939, the month in which the patent in suit issued, the plaintiff purchased seals of the type here accused from the defendant. Thereafter, the plaintiff made no charge of infringement to defendant until it filed the complaint herein on September 18, 1944. This delay constituted laches.

## CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and the subject matter.

2. The claim of the Johnson patent is invalid for lack of novelty.

3. The claim of the Johnson patent is invalid for lack of invention.

4. The defendant is entitled to a decree dismissing the complaint, and for costs.

.....

United States District Judge.

Dated:

[Endorsed]: Lodged 10-18-46. [44]

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[Title of District Court and Cause.]

### CORRECTIONS TO FINDINGS

Without admitting in any way the correctness of any of the findings, when compared with the evidence of record, we propose that the following most glaring mistakes as to recitation of facts be corrected.

#### Re Finding No. 9

Defendants proposed finding No. 9 is not correct in that it omits and assumes facts and then ends up with a sentence containing a conclusion of law which is not supported in the least by the record. For example, the next to last sentence reads [45] "At least one seal was installed in an automobile." To be a true statement of fact the sentence should go on and state what the undisputed testimony shows; namely, that "the damn things leaked" (Dep. tr. P. 15 Q57). Such a record will not support any conclusion of reduction to practice. To be a reduction to practice the device must be a success. Another example of fact assumption in finding No. 9 is Defendant's failure in its deposition testimony to show that the seals which made 4,000,000 to 5,600,000 strokes were the structure of the Gits seal

in question here. Tarbox, who made the tests, said "that No. 85, I don't think it always refers to that particular construction. I am not positive" (Dep. Tr. 31 Q84). According to Gits the No. 85 was different.

If the Court wishes to make any finding about Gits the following would be supported by the record.

Corrected Finding No. 9: Beginning in 1933 Remi J. Gits, worked with the B. F. Goodrich Rubber Co. and the Spicer Manufacturing Corp. to develop a sealing member of synthetic material for use with a cup member having a peripheral portion and an axially inwardly offset radial flange. Difficulty was encountered due to the then unperfected material, Koroseal, which was used. Various samples were made, some of which were not satisfactory when tested. Several samples were tested by installation in shock absorbers by the Spicer Manufacturing Corp., subjected to 4,000,000 to 5,600,000 reciprocating strokes and found "okeh" but the record is not clear what was the construction of those seals. At least one seal was installed in an automobile but they "leaked." Gits was trying for 2½ years to make an oil seal for Spicer Manufacturing Corp., but the Gits seals scored and leaked. Gits seals were [46] never made or sold for actual use to Spicer Manufacturing Corp. The experimental research engineer for the Spicer Manufacturing Corp. concluded as to the Gits' seal: "The seal was not successful. We

would not bother with it.” and “The final test on them showed they were not satisfactory.”

Re Finding No. 10.

Correct the date of application to read December 14, 1935.

Re Finding No. 12

The words “reduced to practice in 1934” in the first line are improper as a conclusion of law, assuming something not yet found. Furthermore, they have no bearing on Finding No. 12 and are surplusage, besides being contrary to the record as pointed out in the discussion above on Finding No. 9.

Re Finding No. 14

The incorrect words in Defendant’s proposed Finding No. 14 are the words “bonded to both sides of.” Apparently it is Defendant’s purpose to have the Court make a finding of equivalency between the Gits device and the patent in suit. In that case the structures should be compared and found equivalent or not equivalent. Expressions using the words “bonded” or “bonding” are misleading and do not set forth the necessary facts about structural similarity or dissimilarity. Defendant’s proposed [47] statement that in Gits the Sealing member is “bonded to both sides of the radial flange at the offset” is not the fact. A correct finding on which the Court could conclude that there is equivalency or not equivalency should read as follows:



## Corrected Finding No. 14

The Gits oil seal had a cup member with a radial flange 4 offset inwardly from the radial plane of the cup bottom 2 a sealing or packing member 5 with a positioning flange 8 and a cylindrical portion 6 to be clamped against the adjacent cylindrical peripheral wall 3 forming a hole in the offset flange. The ring 11 is expanded radially to wedge the cylindrical portion 6 between the ring 11 and the hole 3 of the case.

The device of the patent in suit (Fig. 1) has a cup member with a radial flange 17 offset inwardly from the radial plane of the cup bottom 20, a sealing member 7 which has its radial portion split into two parts (when viewed in cross-section) so that one radial portion 12 lay on one side of the offset flange and the other radial portion 18 lays on the other side of the offset flange. The split sealing member is secured to both sides of the radial offset flange 17 by cementing or vulcanization and is called bonding in the patent.

The difference in the Gits device and the patented device is that Gits clamps the cylindrical portion 6 against the wall 3 of the hole in the offset flange whereas the patented device holds the sealing member by splitting its radial flange and fastening it against both radial faces of the inwardly offset flange.

## Re Finding No. 15

This finding should be corrected by changing the opening phrase "The record shows" to read "It has the opinion of Defendant's expert."

## Re Finding No. 16

This is a conclusion of law and not a finding of facts. There is no indication in the memorandum opinion that the Court has so concluded as to Gits. Certainly it is not in accordance with the record that Gits anticipated the patent in suit for it failed at Spicer and was abandoned, whereas, Defendant later was able then to sell Spicer the seal in suit which was a success. The principal difference in the two seals is as pointed out above in Corrected Finding No. 14, namely, that the patent in suit split the radial flange of the sealing member and secured it to both radial faces of the inset flange, whereas Gits tried to clamp a cylindrical portion 6 to the cylindrical wall 3 of the hole in the inset flange 4.

## Re Findings Nos. 17, 18 and 19

These findings have to do with the fact that Exhibit 21, the oil seal made and tested successfully by Klein in 1935, has since then changed shape due to "cold flow" so that now the outside radial part of the sealing member projects out in places a few thousandths of an inch beyond the bottom of the cup. Rubber expert Stewart testified that this was to be expected from the material due to the spring pressure exerted on the sealing lip [49] during the intervening eleven years. There is no testimony to rebut the witness Klein who stated that when he

made and tested the device in 1935 the sealing member came within the radial plane of the cup bottom. Nor is there testimony to rebut that of Mr. Johnson and Mr. Klein that in 1935 Exhibit 21 tested very satisfactorily in apparatus simulating actual working conditions. The only conclusion on this testimony is that there was in 1935 a reduction to practice of the invention in suit. The Courts memorandum opinion made no reference to this part of the case therefore Defendant's proposed findings 17 to 20 inclusive are a stab in the dark. If the Court desires to make any findings on this phase of the case they should be corrected as follows to make them complete and in conformance with the record.

Corrected Finding No. 17.

Plaintiff's Exhibits 21 and 22 are oil seals which were made by Harold Klein, an employee of plaintiff, in the late summer or fall of 1935. These exhibits do not now come within the claim of the Johnson patent by a matter of a few thousandths of an inch. After briefs of both parties were filed, proofs were reopened and plaintiff called the witness Klein who testified that, as made, the exhibits came within the patent claim. He identified five drawings as having been made in 1935 and as disclosing the invention.

Corrected Finding No. 18.

The sealing elements in Plaintiff's Exhibit 21 and Plaintiff's Exhibit 22 were made of a ma-

terial known as Thiokol which had such a tendency to cold flow that it is not now regarded as a good material for oil seals, but as [50] used in Exhibit 21 it did not operate successfully for the full 28 days of the test which was run to determine the practicability of the construction of the device in suit.

Corrected Finding No. 19.

Plaintiff's Exhibit 21 was subjected to tests in Plaintiff's laboratory where it has apparatus which simulates actual applications and it was given the regular tests that are given for a seal for general use (Dep. Tr. p. 8). In the course of these tests, no adjacent moving part touched the oil seal being tested except the shaft which projected through it and the housing in which it was held. The tests were sufficient to simulate actual working conditions and the uncontradicted testimony is that they were satisfactory therefore there was a reduction to practice of the invention by Plaintiff in the fall of 1935.

Re Findings Nos. 20 and 24

These findings relate to facts not mentioned in the Court's memorandum opinion and therefore the Court may or may not wish to make findings on them. The erroneous premise on which these findings Nos. 20 and 24 can have relevancy is that Exhibit 21 did not test successfully under conditions like it would get in general service. All the testimony was that it did test well. To have support for

findings 20 and 24 the Defendant would have to get the Court to enter Plaintiff's erroneous finding No. 19. The incomplete and erroneous nature of Finding No. 19 as proposed by Plaintiff has just been exposed above. [51]

Corrected Finding No. 20.

The invention of the Johnson Patent was reduced to practice in October 1935, about 10 months before the filing of the Johnson patent application on August 5, 1936.

Corrected Finding No. 24.

Johnson Patent is not anticipated by the knowledge and public use of seals made by the Victor Manufacturing and Casket Company known as Types A and H, the accused structures herein, exemplified by Plaintiff's Exhibits 6 and 7 as they were not prior to Johnson's reduction practice.

Re Finding No. 21

If this is the anticipation which the Court had in mind in its memorandum opinion there is no formal objection we can make, though we do not agree with the Court. If it is not what the Court had in mind then the finding of anticipation by Gits should be omitted.

Re Findings Nos. 25 and 26

These findings are an attempt to get findings which would in effect nullify all the work done by the oil seal division of the Patent Office which has granted over 1,000 patents on oil seal constructions



and taken over \$60,000 in Government fees from the public. If Defendant's definition of "bonding" as proposed in these findings Nos. 25 and 26 were to be accepted, then the Patent Office should have closed up its oil seal division and have refused to accept any more applications after it granted [52] the first oil seal patent where a sealing member was held in a cup member. It is not that the sealing member is fastened in the cup member, but, How is it fastened and What is the structure of the parts that are fastened? Gits failed because the expended ring 11 did not adequately secure the neck 6 on the wall of the hole 3. The device in suit came along and was a success (even at Spicer where Gits had failed) because in effect it split the radial flange of the sealing member and secured the split portions to the opposite sides of the inwardly offset flange of the cup member. No one in the art had done that before. There is no express evidence of equivalency of all kinds of securing of sealing members in place and the fact of there being so many patents on oil seal devices is positive evidence that the art and the Patent Office believe otherwise. Even this Victor Company which defends this present case has taken out over 50 patents on various ways of holding in the sealing members in oil seals.

Re Findings Nos. 27, 28, 29, 30 and 31

These proposed findings illustrate exactly what we said above about Findings 25 and 26. If the Court accepts the finding about Chandler then it should go on at the end and say that the Commis-

sioner of Patents erred in granting the Johnson patent thereover. The Commissioner had the Chandler patent before him and held there was not equivalency between this and the Johnson structure. Defendants expert on cross-examination admitted there was no substantial difference in the case members of Winter, Fitzgerald or Heintz over the art considered by the Patent Office.

Mohr v. Alliance,

14 F (2d) 799, 800 (C.C.A. 9) and

Park-In Theatres v. M. A. Rogers,

130 F (2d) 745, 747 (C.C.A. 9) [53]

#### Re Finding No. 32

This should be amended by adding at the end: "The Victor Manufacturing and Gasket Company, who are in control of and defending this case brought against their customer, the nominal defendant Chanslor and Lyon Company, manufactured and sold large quantities of the Type A and the Type H seals, subsequent to the Gits experiment, and prior to and since the grant of the Johnson patent in suit."

#### Re Finding No. 36

This should be amended by inserting before the period and after the date "September 18, 1944," the following:

"but the Plaintiff notified the manufacturer, Victor, of such infringement in 1939 promptly upon issuance of the patent."

Note: It is considered better practice among

ethical manufacturers for the owner of the patent which is being infringed to notify the manufacturer and not the customers or dealers of that manufacturer.

Respectfully submitted,

A. DONHAM OWEN,  
Counsel for Plaintiff.

Dated: November 14, 1946.

Service of a copy of the above corrections acknowledged this 14th day of November, 1946.

/s/ A. W. BOYKEN,  
Of Counsel for Defendant.

[Endorsed]: Filed Nov. 18, 1946. [54]

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[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW

The defendant and plaintiff having submitted proposed findings and counter-findings respectively, and it appearing to the court that the same are in unnecessary detail, the Court now makes its own finding of facts as follows:

I.

This is a suit under the patent laws of the United States for infringement of Letters Patent of the United States No. 2,146,677 granted on application of Lloyd A. Johnson.

II.

The plaintiff, National Motor Bearing Co., Inc., a California corporation, has been in the business of manufacturing [55] shims since 1922, and has been manufacturing oil seals since October, 1930.

III.

The defendant, Chanslor & Lyon Co., a California corporation, operates sixteen stores in California, selling automobile merchandise of all kinds.

IV.

The plaintiff is the owner of United States patent to Johnson No. 2,146,677 and is entitled to sue for infringement thereof.

V.

Oil seals, sold by the defendant and manufactured by the Victor Manufacturing & Gasket Co., Plaintiff's Exhibits 6 and 7, known as Type A and Type H respectively, are charged to infringe the Johnson patent.

VI.

The Johnson patent and the claim thereof are void and of no force and effect in law because the alleged invention and improvement claimed to be therein described, disclosed and claimed, have been long prior to the alleged invention or discovery thereof by the said Johnson, or more than two years prior to his alleged application for said patent, patented, described and fully disclosed to the public in various patents including the following: United States Patent No. 1,905,800 to Chandler issued April 25, 1933; United States Patent No. 1,983,746 to Fitz-



gerald issued December 11, 1934; United States Patent No. 2,052,762 to Gits issued September 1, 1936; United States Patent No. 2,071,403 to Heinze issued February 23, 1937 and United States Patent No. 2,089,461 to Winter issued August 10, 1937; that the said Johnson was not the original, first and true inventor or discoverer thereof, or of any material or substantial part of the Fluid Seal claimed to be patented in said patent, but that the same had been in public use and on sale in this country for more than two years prior to Johnson's application for said patent; and that each and every part thereof had been invented, discovered, used by or known to others in this country and elsewhere before the alleged invention, discovery or appropriation thereof by Johnson; that in view of the prior art existing at the time, there was no invention in what Johnson claims to have invented.

## VII.

The Johnson Patent and the claim thereof are invalid and of no force and effect in law for the reason that they involve nothing more than ordinary mechanical and engineering skill and practice and are therefore totally lacking in patentable novelty and invention.

## VIII.

The accused structures were on sale beginning in the summer of 1935. The plaintiff admitted knowledge of them as early as 1937. In February 1939, the month in which the patent in suit issued, the plaintiff purchased seals of the type here accused



from the defendant. Thereafter, the plaintiff made no charge of infringement to defendant until it filed the complaint herein on September 18, 1944. This delay constituted laches.

## CONCLUSIONS OF LAW

### I.

The Court has jurisdiction of the parties and the subject matter.

### II.

The claim of the Johnson patent is invalid for lack of novelty. [57]

### III.

The claim of the Johnson patent is invalid for lack of invention.

### IV.

The defendant is entitled to a decree dismissing the complaint, and for costs.

Dated: November 27, 1946.

LOUIS E. GOODMAN,  
United States District Judge.

[Endorsed]: Filed Nov. 29, 1946. [58]

In the United States District Court for the Northern  
District of California, Southern Division

No. 23697-G

NATIONAL MOTOR BEARING, INC., a Corpo-  
ration,

Plaintiff,

vs.

CHANSLOR & LYON CO., a Corporation,

Defendant.

### FINAL JUDGMENT

This cause came on to be heard, the counsel for the respective parties having filed briefs and thereupon, upon consideration, it was Ordered, Adjudged and Decreed as follows:

1. That the patent to Johnson, No. 2,146,677, and the single claim thereof is invalid.

2. That the Bill of Complaint be dismissed with costs in the amount of \$. . . . . to be taxed by the Clerk.

Dated: November 29, 1946.

LOUIS E. GOODMAN,

United States District Judge.

Approved as to form as provided in Rule 5(d).

A. DONHAM OWEN,

Attorney for Plaintiff.

Receipt of a copy of the foregoing Final Judgment is acknowledged this 18th day of October, 1946.

A. DONHAM OWEN. [59]

[Endorsed]: Filed & Entered Nov. 29, 1946. [60]

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[Title of District Court and Cause.]

NOTICE OF APPEAL UNDER RULE 73 (b)

Notice is hereby given that National Motor Bearing Co., Inc., plaintiff above-named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Final Judgment entered in this action on November 29th, 1946.

A. DONHAM OWEN,  
Attorney for Plaintiff.

Dated: February 25, 1947.

[Endorsed]: Filed Feb. 25, 1947. [61]

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[Title of District Court and Cause.]

ORDER AS TO ORIGINAL PAPERS AND  
EXHIBITS

Pursuant to Rule 75(i) of the Rules of Civil Procedure it is hereby ordered that the originals of all exhibits and the transcripts of testimony in this case be sent to the Appellate Court in lieu of copies, with the understanding that the Clerk of the

Appellate Court will make suitable provision for their safekeeping and will return them when the case is completed on appeal.

LOUIS E. GOODMAN,  
United States District Judge.

Dated: March 14th, 1947. [69]

A copy of the foregoing Order as to Original Papers and Exhibits has been served on counsel for defendant, A. W. Boyken, Esq., by mailing two copies of the same to his office in the Crocker Building, San Francisco, California, this 12th day of March, 1947.

A. DONHAM OWEN.

[Endorsed]: Filed Mar. 14, 1947. [70]

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District Court of the United States, Northern  
District of California

**CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL**

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 78 pages, numbered from 1 to 78, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of National Motor Bearing Co., Inc., a corp., Plaintiff, vs. Chanslor & Lyon Co., a corp., Defendant, No. 23697 G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$16.50, and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 2nd day of May, A.D. 1947.

[Seal]

C. W. CALBREATH,  
Clerk.

/s/ M. E. VAN BUREN,  
Deputy Clerk. [79]



In the District Court of the United States for  
the Northern District of California, Southern  
Division

No. 23,697-G

NATIONAL MOTOR BEARING COMPANY,  
Plaintiff,

vs.

CHANSLOR & LYON COMPANY,  
Defendant.

Before: Hon. Louis E. Goodman,  
Judge

REPORTER'S TRANSCRIPT

Wednesday, January 23, 1946  
10:00 o'Clock A.M.

Counsel Appearing:

For Plaintiff: A. Donham Owen, Esq.

For Defendant: Geo. I. Haight, Esq., A. W. Boy-  
ken, Esq., Carl F. Geppert, Esq. [1\*]

The Clerk: National Motor Bearing Company v.  
Chanslor & Lyon, for trial.

Mr. Boyken: Ready for defendant.

Mr. Owen: Ready, your Honor. [2]

Now, I think we can start in with our proofs.

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\* Page numbering appearing at top of page of original Reporter's  
Transcript of Record.

The patent in suit, Johnson No. 2,146,677, we offer as Plaintiff's Exhibit 1.

The Court: Very well.

(The patent referred to was marked Plaintiff's Exhibit 1 in evidence.)

[Plaintiff's Exhibit No. 1 appears in Book of Exhibits.]

Mr. Owen: I believe that Mr. Haight is willing to stipulate that title to that patent stands in the plaintiff; is that correct?

Mr. Haight: We will so stipulate.

Mr. Owen: Also, I believe they are willing to stipulate to the incorporation of the plaintiff.

Mr. Haight: Quite so, your Honor.

Mr. Owen: And that it is doing business in this district.

Mr. Haight: Quite so.

Mr. Owen: We offer as Plaintiff's Exhibit next in order a cut-open sample of Defendant's Type H oil seal which has stamped on it with a metal stamp, "Victor 49324."

The Court: I take it there is no objection to them.

(The sample was marked Plaintiff's Exhibit No. 2 in evidence.)

Mr. Owen: And as Exhibit 2-A a sample of the same oil seal which has not been sectioned, which is still complete.

(The object was marked Plaintiff's Exhibit 2-A in evidence.) [37]

Mr. Haight: I take it, your Honor, when we do not make objection it goes in without objection we do not have to say "No objection."

The Court: Very well.

Mr. Haight: We won't be very noisy in that regard.

Mr. Owen: Mr. Johnson, would you please take the stand? [38]

LLOYD A. JOHNSON

called as a witness for the plaintiff; sworn.

Q. (By the Clerk): Will you state your name to the Court.      A. Lloyd A. Johnson.

Direct Examination

By Mr. Owen:

Q. What is your full name?

A. Lloyd A. Johnson.

Q. Are you the president and general manager of the plaintiff company?      A. Yes.

Q. What is the business of the plaintiff company?

A. We manufacture oil seals and shims.

Q. How long has the plaintiff company been in business?      A. Since January 2, 1921.

Q. Did you start the company?      A. Yes.

Q. What was its business then?

A. Manufacturing bearings, babbit bearings.

Q. When did you go into the shim business?

A. 1922—the latter part of 1922.

Q. When did you go into the oil seal business?

A. October 1930. [51]

(Testimony of Lloyd A. Johnson.)

Q. Will you describe briefly what an oil seal is in the sense in which we are using the term here, and in that connection you may refer to this chart, a photostatic enlargement, which I shall ask be marked as exhibit next in number.

(Thereupon photostatic enlargement marked Plaintiff's Exhibit No. 3.)

[Plaintiff's Exhibit No. 3 appears in Book of Exhibits.]

Q. (By Mr. Owen): Would you describe briefly what these represent so it will be clear in the record?

A. This is an electric motor with a gear reducing unit, a part of the motor. The oil seals——

Q. Would you write oil seals on there and draw lines to them so that will be clear?

A. There are four oil seals shown. On the left of the picture are shown two, between those two oil seals is annular ball bearing. To the right of the armature, or in the center of the casting is another oil seal adjacent to single row ball bearing. At the extreme right of the shaft is another oil seal. In all cases these oil seals are mounted in this machinery for the purpose of retaining the oil that lubricates these bearings. In the case of the oil seal at the right, it not only has to retain the oil seal of the bearings, but take care of any excess lubrication that comes from the gears revolving; and the same is also true of the one in the center. These gear housings usually have considerable lubricant in them to lubricate the gears, so these seals

(Testimony of Lloyd A. Johnson.)

not only seal the oil where the bearing is, but also the larger [52] volume of oil where the gear case is.

Q. Your testimony has been in connection with Exhibit 3?      A. Yes.

Q. Will you also look at the photostatic broken way view which I ask be marked Exhibit 4 and describe what that mechanism is, and how the oil seals function there?

(Thereupon photostat marked Plaintiff's Exhibit No. 4.)

A. In this case the oil seals, the bearing of it looks to be like a Timken Roller Bearing. There is another sealing element in the oil seal unit which appears to be there for the purpose of excluding extraneous matter, dust, sand, and whatever may come in from the outside of this housing.

Q. What does that picture represent; what kind of a piece of machinery?

A. This appears to be the end of a shaft and is attached to a shaft housing which is attached to a toggle, like a drive shaft on an automobile or a truck.

Mr. Owen: I ask that the other broken way picture be marked Plaintiff's Exhibit No. 5.

(Picture marked Plaintiff's Exhibit No. 5.)

Q. (By Mr. Owen): Will you describe what kind of a piece of machinery that is?

A. This is a reduction gear. As the shaft enters



(Testimony of Lloyd A. Johnson.)

the right of this picture the power is carried through these gears in considerable reduction so that when the power is transmitted to this final gear, that comes out of the bottom it is at a very much reduced speed. You will find units [53] like that in trucks where they have to have compound gear reduction. These oil seals in the case of the two oil seals shown at the right, I should say the seal shown in the right is a double oil seal, and usually, where you find double oil seals you look for two sealing members so that there is considerable pressure built up, that the manufacturer doesn't care to rely just on sealing member to hold it, but has a secondary one to insure any seepage being finally held by the second member.

Q. In all cases of these oil seals what are they fitted into; what do you call that in this business?

A. They are fitted into a housing around a shaft, a rotating shaft.

Q. What other kind of machinery are oil seals used on?

A. Oil seals are used in household appliances, washing machines, mangles, electric ironers. They are very extensively used in farm machinery, tractors, disk plows, baling machines; practically every piece of modern or farm machinery uses oil seals. They are used in pumps, compressors, wherever you find bearings in modern equipment, or I should say, practically everywhere you find bearings in modern equipment you will also find oil seals.

Q. Do you keep any figures as president of the

(Testimony of Lloyd A. Johnson.)

company on the amount of business done by the oil seal industry each year?

A. We have figures, some of which are just approximate figures. We know that during the years 1944 and 1945 there were in the neighborhood of eighty million oil seals used by industry each year.

Q. Are you the patentee of the patent in suit which is marked Plaintiff's Exhibit No. 1 in this case?      A. Yes.

Q. Has the plaintiff ever made and sold that device?      A. Yes.

Q. The device of the patent in suit?

A. Yes.

Q. When was that?

A. I can tell you when it first came to my knowledge.

Q. You probably misunderstood my question. I asked you if the plaintiff, that means your company——      A. I beg your pardon.

Q. ——has ever made and sold?

A. No, we haven't.

Q. Why hasn't the plaintiff ever made and sold?

A. After we developed the oil seal we came into a condition that prevented us from making a sealing, because of the commercial position we found ourselves in.

Q. What was that position?

A. The Victor Gasket Manufacturing Company came out with a line of these seals and it was just a Chinese copy of our patent and we didn't care——

(Testimony of Lloyd A. Johnson.)

Mr. Haight: If the Court please, I don't suppose it will do any harm, but I don't think the witness has any right to say that.

The Court: That may go out.

Mr. Owen: You mean "the Chinese copy"?

The Court: Yes.

Q. (By Mr. Owen): Go ahead.

A. The Victor Gasket Manufacturing Company came out with a line of seals that we [55] considered to be the same as our patent and we didn't care to market an identical device, because we don't consider it good practice to go out and sell exactly the same device that is competition with us.

Q. What did you do about it when you discovered the Victor Gasket Manufacturing Company was making this seal?

A. One of the first things we did was to buy some of them.

Q. Was that before or after the patent issued, the patent in suit?

A. I think after the patent in suit issued.

Q. Do you remember what you did when you bought those seals?

A. Yes.

Q. What did you do?

A. Took them down to our plant and examined them and cut them open to see how they were made and then determined that was the type of seal we thought it was.

Q. When you cut open the seals that you bought after the patent issued, did you discover that they

(Testimony of Lloyd A. Johnson.)

were seals like these in the two photostatic enlargements?

A. Some of the seals were like the type shown as Type H and some are like Type A.

Q. From whom had you purchased those?

A. Chanslor & Lyon Company.

Q. Is that the defendant in this case?

A. Yes.

Mr. Owen: I offer as Plaintiff's Exhibit No. 6 the defendant's Type A device in suit, the enlargement thereof, and as Plaintiff's Exhibit No. 7 the defendant's Type H device in suit. [56]

(Type A device in suit marked Plaintiff's Exhibit No. 6. Type H. device in suit marked Plaintiff's Exhibit No. 7.)

[Plaintiff's Exhibits Nos. 6 and 7 appear in book of exhibits.]

Mr. Owen: Q. When you cut those seals open did you show them to me? A. Yes.

Q. That was in 1939? A. 1939.

Q. Now, going back to this point about why the plaintiff never marketed this device, I don't believe you finished your answer. I asked you what you did when you discovered that?

A. After examining these samples I wrote the Victor Company and advised them that we had this patent which is in suit and suggested that we discuss the matter, talk over the matter.

Q. Did you ever talk it over? A. Yes.

Q. With whom?

(Testimony of Lloyd A. Johnson.)

A. I talked it over with a Mr. Court Secrest, Mr. Gammie, and Mr. John Victor.

Q. Whereabouts?

A. In Chicago—at both—there were three conferences that were held. I think it is called the Illinois Athletic Club on Michigan Avenue, Chicago.

Q. Do you know about what year that was?

A. That was in 1939—April 1939.

Q. What came of that meeting or those meetings?

A. Well, the first meeting I had I discussed the question of licensing the Victor Company under this patent and I believe it was in the second meeting I suggested an alternate and that was that the Victor Company buy this patent from us and give back to National Motor Bearing Company a non-exclusive license. My [57] thought was that since Victor had gotten so well started at selling these seals I didn't see much possibility of our wanting to market them, and under the circumstances that we might avoid litigation and I felt that we might make a profit on our license to Victor or from Victor, in either case, which would in a measure offset the loss of being able to make the seals.

Q. Did Victor ever offer to buy it?

A. Yes.

Q. Was the offer satisfactory to you?

A. No.

Q. When you turned that offer down was anything said about infringement or litigation?

A. Oh, surely. I said that at the time. I told



(Testimony of Lloyd A. Johnson.)

Mr. Secrest and Mr. Victor—I very well remember using the words—that their seal was just a Chinese copy of our patent.

Q. That was in 1939, all this that you have related?  
A. Yes.

Q. Why was it that you waited, then, until 1944 to file suit for this infringement?

A. Well, for a time it seemed as though we might get together. I was led to believe that there was some chance of it and I thought that further negotiations might bring about a deal. Probably a year elapsed before I gave up much hope of that.

Q. Why didn't you sue them?

A. Well, England and Germany were then at war and great demands were being placed on our company to manufacture these seals for war equipment such as tanks, and aircraft guns, and all miscellaneous devices of war, and we were advised by the government our facilities were not [58] big enough to handle the expected demand for oil seals, and so we prepared to build a new plant in the East and another one in California. All of that took so much of my time and that of the other executives of the plant and we had to build up our personnel, to make a larger factory and the larger demand we just didn't have time to do it. We felt it was of a great deal more importance to make these seals for the government than it was to take out time for litigation.

Q. What decided you in September of 1944 to authorize the beginning of this suit at that time?

(Testimony of Lloyd A. Johnson.)

A. It was just about that time we were led to believe by some government agencies who were talking about cancelling contracts that the war with German was about over. That is why we felt we could go ahead without impairing our war effort.

Q. Was it necessary after that filing to get continuances because the war lasted longer?

A. Yes.

Q. Have you prepared a chart to show the two devices of the defendant? A. Yes.

Q. One is marked "Fig. 1" and the other is marked "Fig. 2"? A. Yes.

Q. And that is a duplicate of an exhibit which is attached to our bill of particulars? A. Yes.

Mr. Owen: I will offer it now as Plaintiff's Exhibit No. 8.

(Chart showing Fig 1 and Fig. 2 marked Plaintiff's [59] Exhibit No. 8.)

[Plaintiff's Exhibit No. 8 appears in book of exhibits.]

Mr. Owen: Q. Now, the drawings of the defendant's accused devices, have you made a chart of the comparative devices? A. Yes.

Q. Have you them in front of you now?

A. Yes.

Q. Where did you get the illustration on the righthand side which are marked "Patent Figure 5" and "Patent Figure 1"?

A. They are from the drawings of the patent in suit. They are just enlargements of the drawings.

(Testimony of Lloyd A. Johnson.)

Q. Photostatic enlargements? A. Yes, sir.

Q. Of the cross sections? A. Yes.

The Court: Q. They are part of the drawings?

A. That's right.

Mr. Owen: That's right, your honor.

Mr. Haight: That is what this is.

The Court: Yes; the one he has in his hand will be Exhibit No. 9.

Mr. Owen: Yes, your Honor.

(Photostatic enlargement marked Plaintiff's Exhibit No. 9.)

[Plaintiff's Exhibit No. 9 appears in book of exhibits.]

Mr. Owen: Q. Now, will you take the claim of the patent in suit and read it on the structures of the defendant?

A. An oil seal of the type adapted for insertion to seal the annular space between the shaft and a bore in the housing, comprising (a) a cup member—that is this part (indicating)—having a peripheral portion and an axially inwardly offset radial flange [60] and molded resilient member bonded to both sides of said radial flange at said offset so that its outer radial face lies within the radial plane of the cup bottom where it bends inward to form said offset, whereby said molded material is protected from wear by contact with adjacent moving parts.

Q. Do you find that structure in both the Type H and the Type A seal of the defendant?

A. Yes.

(Testimony of Lloyd A. Johnson.)

Q. Has the seal shown by the patent in suit—  
strike that. Has the oil seal put out by the defend-  
ant as Type A and Type H been a commercial suc-  
cess?           A. Yes.

Mr. Owen: You may cross examine.

The Court: Do you wish this last exhibit ad-  
mitted?

Mr. Owen: Yes, we offer that last chart in evi-  
dence as Plaintiff's Exhibit No. 10.

(Chart marked Plaintiff's Exhibit No. 10.)

[Plaintiff's Exhibit No. 10 appears in book  
of exhibits.]

#### Cross-Examination

By Mr. Haight:

Q. When did you first see on the market any-  
where either of the seals, Type A or Type H?

A. I didn't hear the first part of that question.

Q. When did you first see upon the market any-  
where either of the seals, Type A or Type H, to  
which you have referred?           A. In 1939.

Q. About what time in 1939?

A. Early in 1939.

Q. Have you any knowledge, or have you any  
way of fixing the time as to how early; I am not  
asking you to be too accurate, [61] but generally?

A. Yes, in relationship to a letter I wrote Mr.  
Victor which was in February 1939.

Q. Type H was then on the market, was it, to  
your knowledge?           A. Which is Type H?

Q. One of those you testified about.



(Testimony of Lloyd A. Johnson.)

A. I don't know whether the drawing on top or bottom is that one—Type H?

Q. Yes. A. Or Type A?

Q. Type H?

A. Excuse me—if that was on the market at that time?

The Court: Q. No, he wants to know which was on first.

Mr. Haight: Q. Yes, I want to know which was on the market first.

A. As far as I know, I believe that Type A was first.

Q. And how early did you see that on the market? A. At that time, in February.

Q. When did you first see the other one on the market? A. At the same time.

Q. And where did you see those?

A. At Chanslor & Lyon Company in San Francisco.

Q. You purchased one of each?

A. Several of each.

Q. Several of each? A. Yes.

Q. And you examined them? A. Yes.

Q. What has become of them?

A. We have one of them.

Q. Did you bring it with you?

A. I believe Mr. Owen has it.

Mr. Owen: It is already in evidence, Mr. Haight. Well, [62] no, this is one which is later.



(Testimony of Lloyd A. Johnson.)

Q. (By Mr. Haight) : I am advised by counsel that Plaintiff's Exhibit No. 2 is the one that was purchased later, is that correct?      A. Yes.

Q. That is right, is it?      A. Yes.

Q. What has become of those that you purchased early in 1939?

A. They were lost. We moved our factory in 1941 and we lost quite a box of samples at that time.

Q. When did you last see any of them?

A. I don't recall; it was sometime prior to 1941.

Q. What search did you make for them, or did you make a search?

A. I didn't make a search for them at that time.

Q. Have you since then?      A. Yes.

Q. When?

A. Oh, within the last six weeks.

Q. Where did you search?

A. In our engineering department, in my office, and in the storeroom in the factory.

Q. You didn't know then that they might have been lost in 1941, did you?

A. I had a recollection that I hadn't seen them for some time.

Q. Where did you make this search?

A. This last search?

Q. Yes.      A. I made it in Redwood City.

Q. At what place in Redwood City?

A. At the office of our plant.

Q. And you did not find them?      A. No.

Q. Did you have any regular place where they would likely be? [63]

(Testimony of Lloyd A. Johnson.)

A. No; the point is that we not only lost these samples, but a lot of other samples that apparently became lost when we moved from Oakland to Redwood City, like some other things that were lost.

Q. Did anybody search, so far as you know?

A. Yes.

Q. Who?

A. I directed some men in the engineering department to look for them—Mr. Owen.

Q. Did Mr. Owen search, too? A. Yes.

Q. But you are familiar with the fact that those were on the market and being sold by Chanslor & Lyon, the defendant in this case, both types, early in 1939?

A. Yes, they conformed to catalogs issued at that time which I also obtained. Those pictures were in these catalogs.

Q. Now, you have never made seals corresponding to those of the patent here in suit, the company?

A. Yes, we have.

Q. When? A. In 1935.

Q. Did you sell them? A. No.

Q. Did you make them in your plant?

A. Yes.

Q. Then how extensively did you make them at that time?

A. Well, we made quite a number as we were at that time trying to develop a synthetic rubber oil seal.

Q. Did you? A. Yes.

Q. Did you market it? A. No.

(Testimony of Lloyd A. Johnson.)

Q. Did it work? A. Yes.

Q. And all of this was in 1935? A. Yes.

Q. Was your plant in condition to manufacture them at that time? A. No.

Q. What was wrong? A. We were at that time manufacturing leather oil seals and felt oil seals and we had not formulated our program for equipment.

Q. Did it require expensive equipment to make these seals? A. Very expensive.

Q. And quite different equipment from that required in making leather sealing elements?

A. Some of both kinds of equipment, new, and equipment we had on hand.

Q. The seals you were then making were wholly satisfactory? A. No.

Q. They were unsatisfactory, were they?

A. No.

Q. Well, which is it, satisfactory or unsatisfactory?

A. You asked me if they were wholly unsatisfactory, and I said no, they were not.

Q. Were they in any respect unsatisfactory?

A. Yes.

Q. In what respect?

A. Leather oil seals in certain applications would not do 100 per cent sealing jobs; applications of high speed and high temperature.

Q. Did you know of any sealing elements that would do a better sealing job at that time in 1935?

(Testimony of Lloyd A. Johnson.)

A. Not until we developed the seal I speak of.

Q. That was in 1935? A. Yes.

Q. But you didn't use the other one? You continued to use the [65] one that was inferior to that better one, is that right? A. That's right.

Q. Now, it was four years after you had a perfectly satisfactory seal that you say was made in accordance with the Johnson patent in suit before you saw these seals made by Victor Manufacturing and Gasket Company, isn't that so?

A. Approximately.

Q. You have given some reason as to why you didn't make them after you saw these on the market in 1939. Why didn't you make them from 1935 to 1939?

A. One of the reasons was that our patent hadn't issued. That took a couple of years.

Q. What difference would that make?

A. We don't care to market a product until we have it patented, if we can help it.

Q. Is that the reason you are not marketing them now? A. No.

Mr. Owen: I move that be stricken.

Q. (By Mr. Haight): Anyhow, you had, or you did nothing about it from 1935 to 1939; that is the fact, isn't it? A. No.

Q. What did you do about it?

A. We kept on experimenting.

Q. With what?

A. With these seals in question.

(Testimony of Lloyd A. Johnson.)

Q. Did you keep on experimenting after you applied for your patent?

A. Yes, kept on testing, I should say.

Q. What did you mean when you said experimenting? What experimenting was necessary after the time you applied for your patent?

A. After you create a new device, you have to find out the methods and ways that you can manufacture it economically. [66] That takes time—finding a manufacturing layout and procedures, tooling.

Q. But, in any event, during those four years from 1935 to 1939 you continued to manufacture a seal that you knew was inferior to the seal you developed in 1935; that is correct, isn't it?

A. Inferior for some applications—not every application. We still manufacture leather seals.

Q. Do you use anything other than leather in your seals? A. Yes.

Q. What? A. Synthetic rubber.

Q. Do you advertise that in any of your catalogs?

A. No, sir.

Q. You advertise only the leather, do you not?

A. That's right.

Q. And when did you first use a sealing element other than leather in any of your seals since that time you were making these in 1935?

A. 1940.

Q. What material did you then use?

A. We used a synthetic rubber compound.

Q. Did it have any name?



(Testimony of Lloyd A. Johnson.)

A. The basis of it was Neoprene; another compound, the basis of it was Hycar.

Q. Both of those are very well known materials?

A. Those two brands are.

Q. Those two brands have been known for many years, have they not?

A. Not for many years, no.

Q. As early as 1933, were they?

A. I think Neoprene came [67] out at that time.

Q. What about Hycar? A. A little later.

Q. A year or so later?

A. A couple of years, but that is only a fraction of what makes up the sealing element; that is just one ingredient out of many.

Q. What other ingredients do you use?

A. Carbon-black.

Q. What else? A. I don't know.

Q. And all of those are commonly used materials for making sealing elements, aren't they?

A. By themselves they are.

Q. You said you wrote a letter to the Victor Manufacturing and Gasket Company; when was that? A. February 17, 1939.

The Court: Counsel, may I interrupt you to inquire, is that the company that one of the counts mentions as being one of the companies that supplies Chanslor & Lyon. It has been mentioned by the witness and also there has been mentioned people connected with that, and it was not clear to me whether that was the same company. Also, you used that in your introductory statement.

(Testimony of Lloyd A. Johnson.)

Mr. Haight: That is the same company, your Honor.

Q. In respect to this meeting in Chicago you say that it was held at the Illinois Athletic Club?

A. Yes.

Q. Are you sure about that?

Mr. Owen: May I have that question, please?

The Court: He asked him if he was sure about it.

Mr. Owen: The date? [68]

Mr. Haight: No, the place.

The Witness: There were two meetings held there—there were three meetings.

Q. Where was the third one held?

A. The first one was held with Mr. Secrest, I believe it was, in the hotel I was staying at.

Q. Do you know whether Mr. Secrest is living or dead? A. He is deceased.

Q. Was Mr. Gammie present at any of these meetings? A. Yes, the second one.

Q. Where was that held?

A. The Illinois Athletic Club.

Q. When he was present, who else was present besides himself and yourself? A. Mr. Secrest.

Q. And that is all? A. Yes.

Q. At the third meeting?

A. The third meeting was held with Mr. John Victor and Mr. Secrest.

Q. Wasn't Mr. Gammie present at that meeting?

A. I don't believe so.

(Testimony of Lloyd A. Johnson.)

Q. Wasn't that meeting held at the Union League Club in Chicago?

A. I am trying to place the Union League Club.

Q. Is it on Jackson Boulevard? A. No.

Q. You said that you made an endeavor to sell this patent, did you not? A. Incidentally.

Q. Did they tell you that they had that patent examined and it had been pronounced invalid?

A. No, they intimated it, but [69] they didn't say that.

Q. You said you didn't file suit until 1944, because you were led to believe there was a chance to get together. When were you led to believe there was a chance to get together?

A. After these three meeting in Chicago I felt that the reasonableness of the position that we took and the apparent reasonableness of the Victor Company, there might still be a chance to get together and avoid litigation. [70]

Q. And when you said you were led to believe, you simply thought that; that was it, wasn't it?

A. I thought it as a result of the conversations that I had had.

Q. Did anybody say anything to you or write anything to you that led you to believe as you say?

A. Our conversations did.

Q. And your last conversation was held in the spring of 1939, was it not? A. That's right.

Q. So I will ask you again, when you said you were led to believe, that was simply your thought; nobody had said anything or done anything on

(Testimony of Lloyd A. Johnson.)

which you could found that belief, isn't that correct?      A. No, it isn't.

Q. What is the fact about it, then?

A. Well, the fact of the matter is that these gentlemen from the Victory Company indicated a desire to avoid litigation, and it appeared to me that they were serious about avoiding litigation. and if we could find a meeting of common ground that they would meet me part way and I would meet them part way.

Q. Was any offer made to you to avoid litigation?      A. Yes.

Q. How much?

A. \$2000. Only it was an offer to purchase the patent, which I felt would avoid litigation.

Q. And that is what they thought also, wasn't it? That is what they told you, wasn't it?

A. Well, of course——

Q. They would only buy it to avoid litigation?

A. No.

Q. What did they tell you about it?

A. We discussed the value of—let me cut that if we can. The premise on which [71] I approached the Victor Company was to this effect——

Q. Now just confine yourself to conversations and we will get along.      A. I will.

Q. All right.

A. I offered to sell them the patent and retain a free non-exclusive license for National Motor Bearing Company. I felt then that—well, I also said that if they didn't care to buy the patent, I

(Testimony of Lloyd A. Johnson.)

would license them. We talked royalties. Mr. Victor asked me how much royalty I wanted, and I started off with 5 per cent. Ultimately I cut it to 2 per cent after considerable discussion. Now, those kind of negotiations are more or less commonplace in industry.

Q. But they turned you down, didn't they?

A. They turned me down on the license, yes.

Q. And everything else, didn't they?

A. No, they offered to buy the patent.

Q. For the amount you stated?

A. For \$2000.

Q. Now, you said something about having built a new plant for your company. When was that built?

A. We got into it in August, 1941, and started to build it the first of 1941, in Redwood City. In Ohio we started that plant in 1940.

Q. Can you give us any idea, without going into detail, as to the size of the Ohio plant?

A. Yes.

Q. Give us some idea very briefly.

A. It is on 10 acres of land and has about 60,000 square feet.

Q. Did you put new machinery in it?

A. Yes. [72]

Q. And about how big was the Redwood City plant?

A. At that time it wasn't in existence.

Q. In 1941 how big was it?

A. 119,000 square feet.



(Testimony of Lloyd A. Johnson.)

Q. New machinery? A. Some.

Q. When you put the new machinery in the Ohio plant would it have been difficult to put in presses and stamping machines to make the seal that you say is represented by Figs. 1 and 2—that is, seals as you say to be like the patent in suit?

A. No, it wasn't at all difficult. We did put those kind of presses in.

Q. But you didn't make that seal, did you?

A. No.

Q. But you then had the opportunity to make it, didn't you? A. Yes.

Q. No difficulty about the machinery, at all?

A. We could have put additional equipment in. This kind of seal requires additional machinery over the making of a leather seal.

Q. But you then had the opportunity to manufacture the seal of the patent, did you not?

A. Oh, yes.

Q. And you didn't?

A. We have had that opportunity all along.

Q. And you have never availed of it, have you?

A. No.

Q. No? A. It isn't good business.

Q. Now you, as I understood you, say that you find the elements of Claim 1 in the structures of the oil seals Type A and Type H. I understood you correctly, did I not? A. Yes.

Q. What is your idea of the meaning of the word "axially"? [73] A. Axially?

Q. Yes. A. Means along the axis.

(Testimony of Lloyd A. Johnson.)

Q. And in a seal like this?

A. That would be parallel.

Q. And likewise I am pointing to a representation of Type H and, for that matter, a representation of Type A. That axis would be in the same direction as the axis of a shaft on which it was mounted, wouldn't it be? A. Yes.

Q. And that would be the axis of the seal, wouldn't it?

A. Yes, it is the direction, like east is east and west is west.

Q. That's right. And if we look at this as we would look upon an ordinary map that would run east and west; that is right, isn't it? A. Yes.

Q. And radially—which way does that run?

A. North and south.

Q. North and south. Now, running southwest, wouldn't be running east and west or north and south, would it? Would it? A. It depends.

Q. Let us take in Fig. 2, Type H, that runs southwest, doesn't it?

A. It runs from north to south and from that point to southwest.

Q. That's right. And so——

A. You are speaking of the radial flange, aren't you?

Q. That's right. But at the point where the sealing element is attached it is neither radial—it isn't radial, is it, at that point, that is, north and south? A. It is radial. [74]

Q. How can it be if radial is north and south?

(Testimony of Lloyd A. Johnson.)

A. I think we are getting off on the wrong foot when we use that as an illustration.

Q. I don't think I am. A. I think you are.

Q. But running southwest, as we say, is not radial, is it?

A. Yes, the sun's rays radiate.

Q. Oh, that is the sense in which you use it: It radiates. But it isn't radial even though it radiates, is it?

A. That member is radial. In other words, that radial member starts at the periphery of the seal and comes down—draw your pencil right down.

Q. Now it is radial? A. That is radial.

Q. Now what is it? A. It is still radial.

Q. When it goes southwest it is still radial?

A. Yes.

Q. That is what you say? A. Yes.

Q. Now, when it goes southwest is it axial?

A. If it were axial in the definition of the terms used in this patent it would be parallel.

Q. So as you interpret this claim you can strike "axially" out, can't you? A. No.

Q. It doesn't mean anything?

A. Yes, it means a great deal.

Q. You can strike out "radial"; that doesn't mean anything, does it? A. Yes, it does.

Q. It means that it is radial, doesn't it, and axial means that it is axial, and you say that axial means that it is not [75] axial and radial means that it is not radial?

A. Radial isn't an axial direction.

(Testimony of Lloyd A. Johnson.)

Q. Will you explain that, "radial in an axial direction"? One is north and south and the other is east and west.

A. I will try to give it as I read the claim, if you want me to.

Q. I am reading the claim correctly, I think, and I am reading to you the words "axially inwardly offset radial"—

A. You start with a radial flange.

Q. All right.

A. That is this portion (indicating).

Q. All right.

A. The radial flange is this portion of the seal.

Q. All right. Then what is it after that?

Mr. Owen: Would you mark that with an "x," Mr. Johnson? You are marking that on Exhibit 10?

A. 10 (marking on exhibit).

Q. (By Mr. Haight): All right. The part that you have marked with a pencil cross with a lead line to the grey portion of the cut, that is radial?

A. Yes.

Q. Now, it changes its direction, does it not?

A. It is a flange.

Q. The flange changes its direction, does it not?

A. Yes.

Q. And when it changes its direction is it still radial at the point where it changes its direction? I think you can answer that "Yes" or "No."

A. Yes.

Q. It is still radial?

A. Yes. [76]

(Testimony of Lloyd A. Johnson.)

Q. Now, is there any part of that flange represented in Plaintiff's Exhibit 10 that is axial?

A. Any part of the flange?

Q. Yes, sir.           A. Yes.

Q. Which part?

A. The point at which the sealing member rests on the shaft (indicating).

Q. You are now pointing to the sealing element which is represented here in pink, is that right?

A. That's right.

Q. That is axial?           A. Yes.

Q. But the flange is not axial, is it not?

A. That is a flange. It is a sealing flange.

Q. So you arrive at that by forgetting about the flange adding the sealing element to it; that is what you think this patent means, is it?           A. No.

Q. What does it mean when it says it is radial and it is axial?

A. As I have always interpreted this patent, it is made up of a cup member. Part of this cup member is called the periphery.

Q. That is the upper part?

A. That is the outer part is the periphery.

Q. That part is axial, too, isn't it?

A. Correct.

Q. All right.

A. Then when that cup turns to make the bottom, it is radial.

Q. Right.           A. Unquestionably.

Q. Yes, sir, we agree.



(Testimony of Lloyd A. Johnson.)

A. To what degree the inturned axial [77] part is radial is the question you are asking me?

Q. I am not asking you about degrees; I am asking you if it is either radial or axial.

A. Axial in its direction.

Q. That is right. And so is radial, isn't it?

A. What is that?

Q. Radial relates to direction also, doesn't it?

A. Yes.

Q. And now will you just look at your claim again and see if you can make an answer to this one: As you interpret it, doesn't the claim mean exactly the same if you strike both "axially" and "radial" out of it and simply read it "An inwardly offset flange?" You don't find any difference between what I have just read and what the claim says, do you? I want to be sure that I get your answers.

A. I want to be sure I understand your question.

Q. All right, I want you to. Let's try again and see if you do understand.

A. Which words do you want me to cut out?

Q. I want you to cut out "axially" and I want you to cut out "radial."

A. To cut out "radial" the thing wouldn't make sense.

Q. All right. That is the best answer you can give to that. How about "axially?"

A. "Axial" is descriptive.

Q. Of what?

A. Of the position the radial flange takes.

(Testimony of Lloyd A. Johnson.)

Q. All right. And that is parallel to the axis, isn't it? That is east and west?

A. That is in that direction.

Q. Aren't you going to stick to the east and west? [78] A. Oh, no.

Q. You aren't going to? Oh, well—now, there is a clause in that claim at the end, "Whereby said molded material is protected from wear by contact with adjacent moving parts." How do you interpret that?

A. I interpret it to mean the molded material relating to the sealing flange——

Q. Yes.

A. (Continuing): "is protected from wear by contact with the adjacent moving parts. In other words, the heel of the cup, the bottom of the cup protects gears that might revolve next to it from catching the sealing member.

Q. Now, the only adjacent moving parts there would be the shaft, wouldn't it?

A. No, it could be a gear on a shaft and it could be a bearing.

Q. As you look at——

A. It could be a slinger; it could be anything that would be an adjacent part.

Q. Now, I have an oil seal in my hand. When you talk about adjacent moving parts, will you state where, in your judgment, in respect to that claim, such an adjacent moving part would be in reference to an oil seal such as I hand you?

A. Where the heel of this sealing member is

(Testimony of Lloyd A. Johnson.)

where it is protected by the bottom of the cup, or this radial flange can be so installed that it is mounted adjacent a revolving gear or some other device.

Q. Well, if it were mounted so adjacent to the gear that they were in collision metal-to-metal, there would be some wear [79] somewhere, wouldn't there?

A. The answer to that is that in many applications the oil seal is used for a spacer as well as an oil seal.

Q. But until it is in such a position there is no protection required, is there?

A. It doesn't happen in every application.

Q. What is that?

A. It doesn't happen in every application.

Q. It doesn't happen in most applications, does it?

A. The majority of them, I would say, 51 per cent, it doesn't.

Q. Do you know now of any place where the defendants in this case have mounted a seal in that manner?

A. I don't know where the defendants have ever mounted a seal.

Q. But you don't know that they have ever thus mounted a seal, do you?      A. No.

Q. And particularly you don't know that they have ever so mounted a Type H or Type A seal?

A. I don't know what they do other than sell the seals.

(Testimony of Lloyd A. Johnson.)

The Court: We will take a recess at this time.

(Recess.)

Mr. Haight: Mr. Johnson——

Mr. Owen: May I just interrupt, your Honor, one minute? I have a witness under subpoena to be here at three, thinking that we would be ready for him. It is agreeable to him to come back in the morning at ten. Would it be all right if the court so instructs him? [80]

Mr. Haight: Yes, it is all right with us.

Mr. Owen: Then we won't interrupt Mr. Johnson's cross-examination.

The Court: You may just tell him to return at ten.

The Court: I am sorry this naturalization matter took longer than I thought. I thought it was more or less of a formal matter, else I would not have taken it up at three o'clock.

Mr. Haight: Mr. Johnson——

The Witness: May I interrupt to say that one of the questions you asked me, I answered incorrectly.

Q. Yes. A. Technically.

Q. Which one was that?

A. You asked me when I first was aware of this infringing seal, and I told you 1939, as I recall it. I should have said 1937. Now, I don't——

Q. Now, you and I won't quarrel about "infringing seal," but what you are referring to are the devices Type A and H, is that right?

A. That's right. I was answering your question

(Testimony of Lloyd A. Johnson.)

on the basis of seeing the seal, but I knew about it before that.

Q. That is all right. Thank you. Now, referring to the seal that is depicted in the Johnson patent in suit, such a structure is adapted for use either on a rotating or reciprocating shaft, is it not?

A. Yes.

Q. And that is generally true of these oil seals, isn't it? [81] In the main, isn't that true?

A. The degrees are involved in that. A seal might be all right for a reciprocating shaft in one application, and not in another.

Mr. Haight: Very well. Will the reporter mark this document Defendant's Exhibit GG For Identification?

Mr. Owen: I would just as soon have that offered as our exhibit. I was going to put it in later.

The Clerk: We mark these in order. May we mark it A?

Mr. Owen: Why don't we just mark it Plaintiff's Exhibit 11?

Mr. Haight: I don't know what your practice is in that regard. We have marked our deposition exhibits with letters and we have reached FF. Is it your custom to begin here——

The Court: Well, are you going to offer the exhibits in the deposition?

Mr. Haight: Yes.

The Court: In the same order that you have them in the deposition?

Mr. Haight: Yes.



(Testimony of Lloyd A. Johnson.)

The Court: And it would be more convenient then to keep the same numbers?

Mr. Haight: Yes.

The Court: Now you have an additional exhibit?

Mr. Haight: Here is an exhibit I would like to have identified to interrogate this witness about now.

Mr. Owen: It was an exhibit I was going to offer. I would just as soon offer it now. It will be Plaintiff's Exhibit [82] 11.

Mr. Haight: All right; offer it.

The Court: Let it be marked Plaintiff's Exhibit 11.

Mr. Haight: O.K.; it serves the same end.

(The document was marked Plaintiff's Exhibit 11 in evidence.)

The Court: Is that it (indicating)?

Mr. Haight: I think that is it.

The Court: Is that it?

Mr. Haight: Yes, it is the outside of that I am going to refer to now.

Q. Mr. Johnson, I am showing you what appears to be a cover of a catalog marked Plaintiff's Exhibit 11. It appears to have been copyrighted in 1934. Are you familiar with that document?

A. Yes.

Q. Is that put out by your company?

A. Yes.

Q. In 1934?

A. Where do you find the date?

Q. Way down here (indicating).

(Testimony of Lloyd A. Johnson.)

A. Well, that is the—that doesn't mean that this catalog was put out in 1934; it means the copyright was acquired in 1934.

Q. Well, do you know when this catalog was put out?

A. I would have to look it up to answer that.

Q. Wasn't the copyright upon the catalog? Isn't that what the copyright date refers to?

A. I think it refers to the design seal and "National," as I recall it. I think that catalog [83] was put out in 1940; somewhere along there, 1939 or '40.

Q. How could you determine when it was put out?

A. I can ask one of the men here in the courtroom.

Mr. Haight: Will your Honor permit that?

The Court: I beg your pardon?

Mr. Haight: He wants to ask one of the men in the courtroom who can give us the date. Is that all right?

The Court: It is all right with the court.

Q. (By Mr. Haight): Will you please do so?

The Witness: Mr. Wray, when was this catalog published?

Mr. Ray: I believe in 1940.

Mr. Haight: Very well. Thank you very much.

Q. Now, will you look at the structure that is represented on the outside cover? Are you familiar with that? A. Yes.

(Testimony of Lloyd A. Johnson.)

Q. How is that sealing element attached to the flange of the cup?

A. How is it attached to the flange?

Mr. Owen: If your Honor please, I believe this is going beyond the cross-examination of the opening case and going into other structures than the witness went into on the opening.

Mr. Haight: I think that is quite true, that it is going into other structures.

Mr. Owen: In other words, it is for the rebuttal case rather than at this point.

Mr. Haight: He appeared as a patent expert and interpreted the claim in response to your questions. [84]

Mr. Owen: That is all right, but we didn't go into any of the other art.

The Court: Well, he may by way of cross-examination, testing some of the answers that were given by another similar form of device.

Mr. Owen: I have no objection to that.

The Court: I think it would be properly within the realm of cross-examination.

Mr. Owen: I have no objection to that.

Mr. Haight: I think I shall stay within those bounds, your Honor.

Q. Is the flange radial in that construction?

A. What do you mean by the flange—the flange of the cup?

Q. Yes.                      A. Yes.

Q. And is this other member immediately beside it also radial?                      A. Yes.

(Testimony of Lloyd A. Johnson.)

Q. And how is that secured between the two members? A. By compression.

Q. Any other means? A. No—no.

Q. What is the function of that little protuberance that I see in the cross section?

A. We call that a dink. There might be six or so of them around the outside shell.

Q. And that is merely held there by compression? A. That's right.

Q. It works all right, does it?

A. In that type of seal. [85]

Q. And what is the sealing element made of? Is that leather?

A. The picture indicates leather?

Q. Molded. It is a molded material?

A. It is molded in a press, yes.

Mr. Haight: That is all, if your Honor please.

#### Redirect Examination

By Mr. Owen:

Q. The Mr. John Victor to whom you referred several times holds what office in the Victor Manufacturing Gasket Company, do you know?

A. My understanding is he is president of the company.

Q. Now, referring to the chart Exhibit 10, Mr. Haight was asking you about the words "axially" and "radial," on that element which reads: "A cup member having a peripheral portion and an axially inwardly offset radial flange." Now, there is no weight given in his question to the words

(Testimony of Lloyd A. Johnson.)

“inwardly” and “offset.” Now, I wish you would take this Exhibit 9, the comparison chart, and as I read these words on that element would you point out on the patent in suit, that is Figs. 1 and 5, representing the patent in suit, what that element applies to? Now, the cup member. What are you pointing to now?

A. I am pointing to the periphery of the cup.

Q. I am talking about the cup member. This is the first element, a cup member. What is that colored on that chart Exhibit 9? A. Blue.

Q. And what is its shape?

A. Well, the shape of the seal is [86] round and it represents a cross section of the seal.

Q. All right. Then it says, “A cup member having a peripheral portion.”

A. That is this portion I have just been pointing to.

Q. Will you draw a line up from that and put the letter “Y”?

(Witness draws on exhibit.)

Q. Now, it says, “An axially inwardly offset radial flange.” Will you point that out in Fig. 5 of the patent? A. That is this portion.

Q. Which portion is that?

A. Right below the periphery where it starts to bend inwardly. This portion (indicating).

Q. Now, the “axially inwardly offset radial flange”—that is which portion—the portion that



(Testimony of Lloyd A. Johnson.)

lies, as I understand it, below this periphery portion?      A. Yes.

Q. Is it all that portion that lies below the periphery portion?      A. Yes.

Q. Is that right? Now, taking the defendant's device, which is shown there as Type H, will you apply these words, "A cup member having a peripheral portion"? Do you find that there?

A. Yes.

Q. And do you find an "axially inwardly offset radial flange"?      A. Yes.

Q. In other words, a radial flange with an axial inward offset?      A. That's right.

Q. Is that there?      A. That is there. [87]

Q. Will you look at Fig. 1 of the patent drawings reproduced on this chart, Exhibit 9, and tell me if you find a cup member there?      A. Yes.

Q. Is that colored blue?      A. Yes.

Q. Do you find a periphery portion for it?

A. Yes.

Q. Will you mark that?

(Witness marked on the exhibit.)

Q. Now, do you find an axially inwardly offset radial flange?      A. Yes.

Q. What does the word "inwardly" refer to in that element?

A. It means that the radial flange is bent in a plane which is inside the seal. This being a cross section, it means that what we would ordinarily

(Testimony of Lloyd A. Johnson.)

term the bottom of the seal or the radial flange is pushed inside the seal.

The Court: Is this a cross section?

Mr. Owen: That is a cross section only of the Type H, your Honor.

The Court: I mean when you are using the term "cross section" you are referring to the view of the seal as shown in this Exhibit No. 2?

Mr. Owen: Exactly, your Honor.

Q. Now do you find in the defendant's Type A seal a cup member having a peripheral portion?

A. Yes.

Q. Will you mark that "Y" on Exhibit 9?

A. I didn't mark the one above that. [88]

Q. Will you also mark it on the one above about which you testified earlier with the letter "Y"?

(The witness marks on the exhibit.)

Q. Now, do you find there that cup member having also an axially inwardly offset radial flange?

A. Yes.

Q. In other words, the radial flange is inwardly offset, is that it? A. That's right.

Q. Is that present there?

A. Yes, it is present in all of them.

Q. Then in the questions that were asked by Mr. Haight and your answers where he was confining all your attention to the words "axially" and "radial," were you taking into account the words "inwardly" and "offset" which are also

(Testimony of Lloyd A. Johnson.)

modifying words, or is the word "inwardly" to be read also with the word "axially" in that element?

A. Yes, the word "inwardly" is describing——

Q. What does it modify?

A. Radial flange that is inwardly offset. To describe, "inwardly," the word "axially" indicates the direction in which the inwardly offset goes.

Q. So that I am clear on what your answer is, what that language then means to you is the cup members having a radial flange with an axially inwardly offset, is that correct?

A. That's right.

Mr. Owen: That is all.

#### Recross-Examination

By Mr. Haight:

Q. Mr. Johnson, on your redirect examination you said that in that phrase that has been discussed, "inwardly" [89] and "offset" were also modifying words. Is "axially" a modifying word?

A. Descriptive.

Q. And is "radial" a modifying word?

A. It is descriptive.

Q. To be sure that I understand what you mean by "descriptive" as related to modifying, is "inwardly" a descriptive word? A. Yes.

Q. And is "offset" a descriptive word?

A. Yes.

Q. The four of them are descriptive words, are they not? A. That's right.

Q. Now, on cross-examination I think you told

(Testimony of Lloyd A. Johnson.)

me that you found the axial part of the flange in the sealing element, itself, did you not?

A. I spoke of the axial part of the sealing flange.

Q. But you found the axial part of the sealing flange, did you not? A. Of the sealing flange.

Q. That is what you called it; that was the axial part of the sealing flange?

A. That is what I said.

Mr. Haight: That is all.

#### Further Redirect Examination

By Mr. Owen:

Q. Mr. Johnson, I didn't so understand your testimony and I want to be sure we are clear on this point: In the patent in suit you use the words "a cup member having a peripheral portion and an axially inwardly offset radial flange." That is at the foot of this structure Fig. 1, isn't it?

A. That is right. [90]

Q. And since the defendant's Type A structure is substantially the same shape as Fig. 1 in the patent, that would also describe it, would it not?

A. Yes.

Q. Then was Mr. Haight correct, or in error, or am I in error, in understanding that you were applying the words "axially inwardly offset radial" to the sealing member, itself? A. No.

Q. You weren't so applying them?

A. No, I was using the word "axially" when I was discussing the sealing element, itself.



(Testimony of Lloyd A. Johnson.)

Q. My understanding was that you used the word "axially" as giving him an illustration of something that was axially trended.

A. That is what I was trying to do.

Q. Referring to the sealing member, is that right?

A. I was using the sealing member, itself, as an illustration of what "axially" meant.

Q. Apart from its use in this element?

A. That's right. I was saying that this portion of the sealing member was axially placed here. This is the axis along the shaft.

The Court: May I ask a question of the witness without offense to counsel?

Mr. Owen: Any time, your Honor.

The Court: This that you have marked "X" is the flange?

A. The radial flange.

Q. Never mind about radial. Is it a flange?

A. Yes.

Q. Now, in the claim the words "axially" and "inwardly," I take [91] it, are adverbs, aren't they?

A. Yes.

Q. And the terms "offset" and "radial" are adjectives; in other words, to read that correctly—and if I am incorrect, why, you explain it to me—that means a radial flange that is offset both axially and inwardly?

A. That is correct.

Q. And is that what you are intending to say?

A. That is what I am trying to get over; that is what I claim the patent is.

Mr. Owen: That is correct.



(Testimony of Lloyd A. Johnson.)

The Court: I guess people that write these things are worse than the judges when they write some of the decisions.

Mr. Owen: I wrote this, your Honor, so I am guilty.

The Court: May I ask another question of either counsel or the witness, so that we can get this clear? Without regard to the merits of this controversy, I am asking this question so that I can relate some of this testimony to what I comprehend to be the type of thing that is involved here: Is this Exhibit 2-A—I say aside from the merits of this controversy—what you call an oil seal?

Mr. Owen: That is correct, your Honor.

The Court: Now, this is adjustable onto a—  
A. Shaft.

Mr. Owen: The witness, I think, can describe exactly how that goes in.

The Court: That is what I want him to do. [92]

The Witness: If you will allow me to stand here.

The Court: Yes. Would counsel object to this?

Mr. Haight: Oh, no, not at all; not at all.

The Witness: If I may take this out, I can show you better.

The Court: All right.

A. This represents—this diameter represents the part that goes on the shaft. Here is a typical shaft.

Q. Well, this is a shaft, and then the oil seal goes onto it, is that it? A. That is right.

Q. And a number of them are used on a shaft?

A. Wherever required.

(Testimony of Lloyd A. Johnson.)

Q. Wherever required?

A. That's right. When this goes on the shaft the usual thing is that the shaft is a little bigger.

Q. That is the purpose of the spring inside?

A. That is the purpose of the spring—like a garter, if you wear garters around your leg.

The Court: That is what I want to know. I wanted to be sure.

Mr. Owen: There is just one other thing I would like to clear up while we are on this point, and that is that this oil seal is slipped on the end of the shaft in Exhibit 5 and into that bore—you see that bore there that has received this seal?

The Court: Does any of the oil get inside of this? A. Yes, it does. [93]

Q. Through this opening, here?

Mr. Owen: Show the Court about that, Mr. Johnson.

A. If I can show you, Judge, on the one that you are looking at—

Mr. Owen: Plaintiff's Exhibit 2.

The Court: 2-A, is it not?

Mr. Owen: That is right.

The Witness: This is called a wiping lip, this part. This faces the lubricant to be sealed. In this case on this Exhibit 5 there is the wiping lip of the seal.

Mr. Owen: Will you just draw a line to that and write "Wiping lip" off from it?

The Court: I may be anticipating what is going

(Testimony of Lloyd A. Johnson.)

to be shown but I wanted to be able just as I have heard this testimony to relate it to the seal.

The Witness: This part we are always talking about is the periphery.

Mr. Owen: The witness is pointing to the outer cylindrical ace of the seal.

The Witness: That portion of the seal, the outside diameter of it, is a little bigger than the hole it fits in so that when it is pushed into the housing, into that hole, the pressure of the press fit holds it in place. [94]

(Thereupon an adjournment was taken until tomorrow, Thursday, January 24, 1946, at ten o'clock a.m.)

Thursday, January 24, 1946, 10:00 o'Clock a.m.

Mr. Owen: Mr. Johnson, will you please take the stand? If your Honor please, I would like to recall Mr. Johnson. He has brought in a further sample of how oil seals are used. I think it may be helpful to the Court.

LLOYD A. JOHNSON

recalled.

Direct Examination

By Mr. Owen:

Q. Mr. Johnson, did you bring in a further illustration of how oil seals are used, and will you

(Testimony of Lloyd A. Johnson.)

explain what you have and what each part represents, and show the court how it is used?

A. I have a seal ring which represents an opening in a housing, the environment in which the seal is inserted has such an opening.

Q. With a ring for this member that is bolted on to the left-hand end of Exhibit 3? A. Yes.

Q. It is equivalent to that?

A. It is equivalent to that. Then I also have a piece of steel which would represent the shaft or a particular piece which would be attachable to the shaft on which the seal operates. Then I have a seal which [97] is attachable, or seals, and I can explain how the seals are mounted and how they operate, with these three pieces, and taking this ring which represents the hole in the housing in which the seal is placed.

Q. That is the larger ring?

A. That is the larger seal ring. The seal is mounted in that housing with the wiping lip of the seal toward the oil that is to be sealed, it is placed in, started in, and then pressed into that housing.

Q. This one actually does not go in, because you do not have the machinery to push it the rest of the way in?

A. It is relieved a little bit, just to allow it to enter, but ordinarily a tool is used to press the seal in the housing, the seal being a little bit bigger than the hole in the housing.

Q. Does that make a tight fit between the seal housing and the bore of the housing?



(Testimony of Lloyd A. Johnson.)

A. Yes, it does, the periphery pressing the seal into the housing makes the outside periphery of the seal move against the inside of the wall of the housing so that there is a tight fit, and the oil cannot seep out on the outside of the seal.

The Court: It prevents the oil from passing out of the lip?

A. No, not at that point, only when the shaft is in place. Now, we put the shaft in.

Q. (By Mr. Owen): That is the smaller of these three elements you have?

A. Yes. The oil is placed on my left-hand side. The oil cannot go out through these holes because it is plugged up with the seal, the shaft being a revolving shaft, turning like this, sometimes at high speed, sometimes at low speed, the oil is prevented from going through because of this sealing flange, sealing material. There is this spring in back of that like a garter that presses on the sealing material around that entire circumference of the flange that prevents the oil from going through. Now, the seal interior is important for the reason that the oil in the back of the wiping lip of the flange creeps up and around the flange if there is any kind of an opening, a very minute opening, so therefore the flange has to be anchored in the interior of the seal, just as carefully as the seal, itself, has to be pressed into the housing so that there cannot be a leak between the sealing member and the seal, and the metal part of the seal. This is a



(Testimony of Lloyd A. Johnson.)

very important point in the manufacture of a seal.

Mr. Owen: I should like to offer these three parts of Plaintiff's Exhibit 12 and ask that the clerk place a string through the hole in the smaller element and around the three parts so that they cannot be separated, and will be kept in relation for future assembly.

(The three parts are marked Plaintiff's Exhibit 12.)

Q. Mr. Johnson, did you also bring this morning the rest of the section of the seal Exhibit 2 which was cut out when that seal was sectioned?

A. Yes. [99]

Q. Have you torn away part of the sealing element on that small section to show how it is bonded to both sides of the sealing member?

A. Yes.

Mr. Owen: That pulls away. If you take hold of the loose end it will pull away. That is a segment out of this exhibit. I offer that segment as Plaintiff's Exhibit 2-B.

(The segment out of the exhibit is marked Plaintiff's Exhibit 2-B in evidence.)

Mr. Owen: That is all.

Mr. Haight: That is all.

Mr. Owen: Will you take the stand, Mr. Lyon?

PHILIP H. LYON

called as a witness for plaintiff; sworn.

The Clerk: Will you state your name to the Court?  
A. Philip H. Lyon.

Direct Examination

By Mr. Owen:

Q. Mr. Lyon, what is your business?

A. President of Chanslor & Lyon Company.

Q. Are you here under subpena? A. Yes.

Q. Is Chanslor & Lyon Company the defendant in this case? A. Yes.

Q. How many stores does Chanslor & Lyon Company have? A. Sixteen.

Q. Whereabouts are they located?

A. In California.

Q. About how many customers have you?

A. 9,000 or 10,000. [100]

Q. What is the general nature of the line of merchandise you folks handle?

A. Automobile merchandise of all kinds.

Q. Is the defense in this case being conducted by the Chanslor & Lyon Company?

Mr. Boyken: Now, if your Honor please, I want to object to that question. I think it is immaterial to the issues in this case who is conducting the defense. There is only one defendant, and that is Chanslor & Lyon Company. There is a simple complaint and the only issue tendered by the complaint is whether the patent is a valid patent and whether it is infringed, and any question as to who is conducting the defense or who is paying for the defense

(Testimony of Philip H. Lyon.)

is entirely irrelevant and immaterial to the issues as tendered in this case.

The Court: I think I rendered a decision on that point.

Mr. Owen: Yes.

The Court: I had that point up.

Mr. Owen: You had it in Hydraulic Press Manufacturing Company v. Brodie Company. In that case your Honor said, "One further matter requires comment." I am reading now from Hydraulic Press Manufacturing Company v. Ralph N. Brodie Company, that is reported in 59 U. S. Patents Quarterly at page 268. The court said:

"One further matter requires comment. The Baldwin Locomotive Works by admission of counsel in open court was stated to be defending this case; hence the Baldwin [101] Locomotive Works should be and I find it to be estopped by the decision herein."

Then it cites Goodman v. Super Mold Corporation of California, 103 Fed. (2d) 474, and B. F. Sturtevant Co. v. Clarage Fan Co., 50 Fed. Supp. 157.

The Court: The only effect of that rule of law, as I recall it—it has been sometime since I studied that point—was that if it appeared that any other party except the defendant was defending a case that the court could hold in the decision that that party is estopped by this decision, not that there is any judgment given against him, but if he has come in and assumed the burden of defending, and it so

(Testimony of Philip H. Lyon.)

appears, he may be held to be estopped by the decision.

Mr. Owen: That is it.

Mr. Boyken: The rule is a little different. I would like to give the court my understanding. In this case there is only one defendant, and it is entirely irrelevant whether that defendant himself is paying for the defense, or conducting it, or what-not. It might be important in some other later case if the plaintiff is successful here and decides to sue some other company, or the Victory Company in this case in another jurisdiction, and then in that second case it could be ascertained whether or not the Victor Company participated in the defense here and was bound by the decision of this court; but that could only come out in that second case, because it [102] might be *res adjudicata* in that case. It is immaterial in this case here who is defending it, but if the plaintiff is successful then perhaps in that second case against the manufacturer it could be ascertained who actually defended the suit here.

Now, I think that is pretty well established. Counsel has mentioned one case, but that is a case I think where there was more than one defendant; as I recall the Brodie case there was more than one defendant. There are many authorities, and I have two. One was decided by the District Court in the Southern District of New York, and that is the case of *Lip Lure, Inc. v. Bloomingdale Bros.*, 27 Fed. Supp. 811.

(Testimony of Philip H. Lyon.)

In that case plaintiff made a motion that was similar to this situation here. Plaintiff made a motion to examine defendants and to compel them to produce and permit inspection of certain documents, and the object was to find out who was defending that suit.

Judge Conger in his opinion, and I only want to read a paragraph or two, on page 811 says this:

“The plaintiff’s contention is that this inspection is sought to ascertain the facts and to find out whether or not the activities of Princess Pat, Ltd., in defending this suit, are of a sufficient degree that the judgment of this court will be binding against it and if the judgment is binding against Princess Pat, Ltd. the plaintiff will [103] have the right to invoke in a subsequent suit between it and Princess Pat, Ltd. the doctrine of estoppel as *res adjudicata*, to the end that the judgment in this action is binding against Princess Pat, Ltd.”

I pause there. That seems to be the situation here. Then the Judge continues?

“I cannot agree with the plaintiff that this is an issue involved in this action. There is no question but that no judgment can be entered against Princess Pat, Ltd. in this action, even though they defend herein, but the fact that they do defend will be relevant in a future action, if judgment is rendered herein in favor of the plaintiff.”



(Testimony of Philip H. Lyon.)

Now, that is my contention here, that in some future action, if the plaintiff is successful against the Victor Company, then it is material to find out whether the Victor Company is bound, but it is not material at this time in this action.

Now, the other authority I have is to the same effect, and that is the case of Prosperity Company v. St. Joe Machines, and that is found in 2 Fed. Rules Decisions at page 299. There again the circumstances were similar to those here. Let me just read a paragraph of that case. It was a decision in the District Court for the Western District of Michigan, and Judge Raymond says: [104]

“Plaintiff’s first motion is for an order to compel defendants to answer questions propounded to certain witnesses upon the taking of depositions, which questions the witnesses refused to answer on advice of counsel for defendants. The witnesses were officers or employees of defendants. The questions were obviously directed to the purpose of learning who, if anyone, aside from the named defendants, is financing or directing the defense. Aside from the matter of privilege, the only restriction placed upon evidence which may be obtained upon discovery examinations is that it must be relevant to the issues in the pending case. Careful consideration of the case of Lip Lure, Inc., v. Bloomingdale Bros. and of the reasoning upon which it is based convinces the court that it is controlling here.”

(Testimony of Philip H. Lyon.)

In other words, this court in Michigan followed the New York Court and held that in the main case the question as to who is defending or conducting the case is immaterial.

That has been followed out here, too. I had a suit before Judge Harrison in Los Angeles about four or five months ago, and his opinion is unreported, though I could supply it, when the same question came up, as to whether or not it is important in the first suit to find out whether the manufacturer or the user was defending it, and Judge Harrison ruled it was immaterial in that case who was defending the suit. I think that is far the better view, and if your Honor has held otherwise [105] in some case——

The Court: That question in the other case did not arise at all by virtue of objection to the introduction of testimony. It appeared without dispute. The attorneys said the locomotive company, having sold this person in Oakland or San Francisco, it was defending the case, so there was not any question about it. In view of my examination of the other decisions along that line I stated in the decision it did not arise.

Mr. Boyken: I suppose, under those circumstances, it was quite proper, but there were other defendants, it seems to me, in that case, they were Eastern defendants, and they remained defendants in the suit. It may be that your Honor thought they voluntarily appeared, and maybe they did, but that is not the situation here.

(Testimony of Philip H. Lyon.)

Mr. Owen: Might I cite my law? I have not done so.

The Court: All right.

Mr. Owen: I might say that the two cases Mr. Boyken read from were motions; one was a motion for inspection and the other was on deposition.

In the Circuit Court of Appeals in the case of Hy-Lo Unit & Metal Products Co. v. Remote C. Manufacturing Company, 83 Fed. (2d), 345, Judge Wilbur reviews the difference between court cases and concludes by saying: "Consequently, it was held erroneous to exclude evidence of an agreement between the two companies to conduct a joint defense of the action [106] brought against the American Smelting & Refining Company."

Now, he reviews the law there and he says:

"These decisions by the Supreme Court establish the proposition that, in order for a person not formally made a party to a suit to be estopped by the decision therein, he must either be in privity with a party thereto in the strict sense of the term or he must not only aid in the prosecution or defense of a suit, but have the right to participate and control such prosecution or defense."

Then he reviews the facts in that particular case.

Then in the Universal Oil Products Co. v. Winkler-Koch E. Co., 27 Fed. Supp. 161, page 167—and this, by the way, was a case in the District Court in the Northern District of Illinois, where if we are successful in this case we would bring suit against

(Testimony of Philip H. Lyon.)

the Victor Company to enforce these issues of validity and infringement which would be determined here.

The Court says, after reviewing the law:

“In my opinion good faith requires parties participating in and controlling a case, but who are not parties of record, to disclose to the court the fact of such participation, and failing to do so, such parties are not in a position to avoid the effect of the judgment as a bar, on the ground that there is lack of mutuality of estoppel, if the opposing party subsequently learns of their participation.”

Now, where the parties knew, as they do here, who was [107] actually defending the case, and where the manufacturer is in the case, there is certainly no harm to have that matter shown in the record. It helps later on; when we get into Illinois we would bring Mr. Lyon from here to Illinois to testify, or come out and take his deposition, whereas if it was testified to here it is clear and there is no question about it.

In the case of Caterpillar Tractor Company v. International Harvester Company, 32 Fed. Supp. 304—this was in New Jersey—your Honor will recall that International Harvester’s dealer was in Nevada. Judge Norcross tried the case and held the patent valid and infringed; on appeal the Circuit Court of Appeals held most of them valid and infringed and reversed the lower court as to a few, and then Caterpillar went into Delaware——



(Testimony of Philip H. Lyon.)

The Court: Let me interrupt this argument; these cases that have been cited more than likely refer to cases where there was no need arising to ascertain who was defending the case in the primary case, and hence it was not questioned, because of that situation, but what harm could there come if the fact is the manufacturer is defending the case, of having it disclosed to the court when an inquiry is directed to that specific fact in the trial of the case. Now, should the court close his eyes and say, "I won't listen to that now," if there is another suit that will have to be proved in another suit, when if there is no question about it it might be determined [108] right here. It does not seem to me that that is equitable. I am wondering whether in those two cases the issue arose at a time when it was conceded for certain purposes during the trial of the case either by stipulation or by questioning of the witness.

Mr. Boyken: Those two cases from which I read are cases which your Honor has termed primary cases, they are not the last cases on the subject. They are the first cases in both instances, and the court held, and I think that is a proper rule, if I may say so, that the trial should be limited to the issues that are tendered by the complaint and by the answer. Now, in this case there is nothing said in the complaint about who is defending the case or anything of that kind. It merely says that these seals were manufactured by the Victor Company



(Testimony of Philip H. Lyon.)

and sold by Chanslor & Lyon. I have represented Chanslor & Lyon in the past for many years.

The Court: Aren't we wasting a lot of time on something that is rather hypertechnical? I suppose in my practice this is the second time I have met this question. What possible advantage could either side gain one way or the other, or what possible disadvantage could there be to you on the other side of the case if that is the fact. Unless there is some substantial right violated, if it really would be something prejudicial to the case of the defendant I do not see what harm can come from it; it is not going to make any difference [109] to me who is defending the action, all I am going to do is to decide whether the patent is invalid or whether it is infringed, and if they get more astute lawyers than they have out here from the Eastern part of the United States, I am only going to decide the case on the question of infringement and the invalidity I do not think it is worth wasting time over this matter.

Mr. Boyken: I can't tell you all of the reasons why we interpose this objection to the question and this line of testimony. There probably may be very good reasons, but your Honor cannot get away from this proposition, that the only issue before this court is the validity of this patent and infringement of the patent, and there is no reason shown for going outside of the issues as tendered by the pleadings in this case; there is no reason shown for it right now; that might arise later, but not now.

(Testimony of Philip H. Lyon.)

The Court: If I should decide the case in favor of the defendant then I will strike that evidence from the record.

Mr. Owen: No, they will want it in then.

The Court: I will allow the testimony. I will overrule the objection, and you may make a motion to strike when you submit the case, and if I do not consider it material I will strike it out.

Mr. Boyken: May my objection go to the entire line of the testimony in addition to this particular question?

The Court: Yes. [110]

Mr. Boyken: May my objection go to the entire line of the testimony in addition to this particular question?

The Court: Yes.

Mr. Owen: Will you read the question?

(Question read by the reporter.)

A. Counsel is out there. We did not employ the counsel. Is that the answer you want?

Q. Yes, that is all right. Who employed the counsel, do you know?

A. I presume the Victor Company; in fact, I am sure of it.

Q. The Victor Manufacturing Company?

A. Yes.

Q. The Victor Manufacturing Gasket Company is directing the defense of the case? A. Yes.

Mr. Owen: That is all, Mr. Lyon.

Mr. Boyken: I will move to strike out that testimony on the ground it is irrelevant and immaterial to any issue tendered by the pleadings in the case.

The Court: I will reserve a rule on the motion until the case is submitted.

Mr. Owen: Your Honor, that closes our prima facie case.

Mr. Haight: I would like, your Honor, to offer in evidence a certified copy of the file wrapper and contents of the Johnson patent in suit. May this all go in?

Mr. Owen: Yes.

Mr. Haight: Which number is that going to be? We are going to offer depositions and in the depositions the exhibits [111] are lettered throughout the alphabet and then with double letters, that is, AA to FF, and it would be most convenient on the record to keep those same exhibit numbers.

The Court: The exhibits you are now offering are in addition to those in the depositions?

Mr. Haight: These are in addition.

The Court: Suppose we continue from there on.

The Clerk: Could I suggest that we start with AAA?

Mr. Owen: I have no objection if they want to introduce the depositions.

Mr. Haight: Then I offer that as Defendant's Exhibit AAA.

The Court: That is the file wrapper?

Mr. Haight: That is the file wrapper.

(File wrapper of Johnson patent was marked Defendant's Exhibit AAA in evidence.)

[Defendant's Exhibit AAA appears in book of exhibits.]

Mr. Haight: I next offer in evidence as Defendant's Exhibit AAB a book of patents. Would you like me to have me, Mr. Owen, put the list on the record? I have all of the patents set up in the answer and in the notice, and then I have separate in that same volume the file wrapper references, and then I am going to offer two others that are not in the notice.

Mr. Owen: The only ones in that list to which I shall object are the last two that are being offered; my only objection to those is that we did not get notice of them thirty days before the trial.

Mr. Haight: They are only going in for the purpose of [112] showing the state of the art.

Mr. Owen: If they are only for that purpose there is no objection.

Mr. Haight: They are only for that purpose.

Mr. Haight: Do you wish, Mr. Owen, for me to read these, or shall I just hand them to the reporter and he can put those in this report and save the time of reading them? Is that all right?

Mr. Owen: Yes.

(The book of patents is marked Defendant's Exhibit AAB.)

[Defendant's Exhibit AAB appears in book of exhibits.]

The documents referred to by Mr. Haight read as follows:

“PATENTS SET UP IN ANSWER

No. 1,040,308	Godley, Oct. 8, 1912.
1,617,587	Frumveller*, Feb. 15, 1927.
1,740,929	Loock, Dec. 24, 1929.
1,905,800	Chandler, Apr. 25, 1933.
1,983,746	Fitzgerald, Dec. 11, 1934.
2,000,341	Larch*, May 7, 1935.
2,013,333	Anderson, Sept. 3, 1935.
2,052,762	Gits, Sept. 1, 1936.
2,071,403	Heinze, Feb. 23, 1937.
2,089,461	Winter, Aug. 10, 1937.
2,094,160	Oldberg*, Sept. 28, 1937.
2,114,908	Peterson, Apr. 19, 1938.
2,116,240	Heinze, May 3, 1938.
1,817,095	Penick, et al., Aug. 4, 1931. [113]
1,861,153	Lee, June 7, 1932.
1,996,210	Lord, et al., April 2, 1935.
2,004,669	Miller, June 11, 1935.

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\*Added by amendment.”

“PATENTS CITED BY PATENT OFFICE  
IN PROSECUTION OF JOHNSON  
PATENT IN SUIT

No. 15,061 Re.	Cantrell, et al., Mar. 15, 1921.
1,817,095	Penick, et al., Aug. 4, 1931.
1,905,800	Chandler, Apr. 25, 1933.
1,925,729	Gits, Sept. 5, 1933.
2,028,634	Walker, Jan. 21, 1936.
2,052,603	Christenson, Sept. 1, 1936.
2,052,762	Gits, Sept. 1, 1936.”



Mr. Haight: Now, I would like to offer in evidence depositions taken in Chicago and in Toledo as Defendant's Exhibit——

The Court: I think we needn't give the depositions an exhibit number. I never followed that practice. You might just describe the depositions and they will be considered in evidence. You might say for the record what depositions they are.

Mr. Haight: Yes, I will. These depositions appear in two volumes in this action, one volume being the depositions of R. J. Gits, Fred A. Reeves, James Zap, Beatrice M. Krejce, taken at Chicago, and in the second volume the depositions of Fred L. Haushalter and G. L. Tarbox, taken at Toledo, and [114] various exhibits that are now present and that are identified on the record from Exhibit A through the alphabet and AA to and including FF.

The Court: Very well, they all may be admitted.

Mr. Owen: That is all the exhibits are offered in evidence?

Mr. Haight: Now, in addition I have, Mr. Owen, photostatic copies—I have only one copy each of these two patents, but you can check them later. I think you will find them all right, so I am going to offer photostatic copies at this time. One is of the patent to Cunningham, 1,930,708, filed December 21, 1931, and issued October 17, 1933, and the other is the patent to Padgett, No. 2,093,572, applied for October 4, 1934, and issued September 27, 1937. Mr. Owen suggests that those be limited only for the purpose of showing the prior art and the offer is so limited.

The Court: Do you want them marked as one exhibit?

Mr. Haight: May I have the Cunningham exhibit marked as AAC and the Padgett as AAD?

The Court: They may be admitted and marked.

(The patents were marked, respectively, Defendant's Exhibits AAC and AAD, in evidence.)

[Defendant's Exhibits AAC and AAD appear in book of exhibits.]

Mr. Haight: Will you take the stand, Mr. Aukers?

Before proceeding with the examination of this witness——

The Court: Let the witness be sworn. [115]

ALBERT J. AUKERS

called as a witness by the defendant; sworn.

The Clerk: Will you state your name to the court.

A. Albert J. Aukers.

Mr. Haight: I am going to ask the witness to use some of these large representations, these very large ones, which I am not going to put on the record, at all. I have, however, smaller copies like this, and what I am going to do when we finish with them, we will hand these copies as we go along. I think it will not be necessary to mark each one of these as an exhibit, they are just enlargements of the drawings appearing in the patents, and they

(Testimony of Albert J. Aukers.)

have been colored, and I find them very convenient to work with. I would like at the end to offer these.

Mr. Owen: As an exhibit?

Mr. Haight: As an exhibit.

Direct Examination

By Mr. Haight:

Q. Mr. Aukers, where do you reside?

A. 7157 South California Avenue, Chicago, Illinois.

Q. What is your occupation?

A. I am product engineer for the Victor Manufacturing & Gasket Company of Chicago, Illinois.

Q. In what business is that company?

A. In the manufacture of gaskets, oil seals, and packing.

Q. How long have you been with that concern?

A. Thirteen and three-quarters years.

Q. What is your age? A. 35. [116]

Q. What have been your various positions, if you have had various positions with that concern?

A. Initially I joined the company in 1932 as a control chemist, and thereafter I held positions as research engineer, experimental engineer, assistant superintendent, mechanical testing engineer, field sales engineer, and for the past five years product engineer.

Q. That is your present position?

A. Yes.

Q. Now, very briefly, Mr. Aukers, what are your duties in that capacity?

(Testimony of Albert J. Aukers.)

A. In the capacity of product engineer I am responsible for the mechanical development of all of the products, the design, the testing, and following through, including contact with all our customers on the application of the products, both development and production.

Q. What was your education?

A. I am a graduate of the Armour Institute of Technology with a degree of Bachelor of Science in engineering.

Q. That institution is located where?

A. Chicago, Illinois.

Q. What year did you graduate? A. 1931.

Q. And immediately after that what did you do?

A. I joined the International Harvester Company, in Chicago.

Q. In what capacity?

A. As a metallurgist, chemical metallurgist.

Q. How long were you with that concern?

A. One year.

Q. Then what did you do next?

A. I joined the Victor Manufacturing & Gasket Company. [117]

Q. And have you been with them ever since?

A. Yes.

Mr. Haight: Now, may I have the large drawing of the Gits patent?

The Court: We will take the usual morning recess.

(Recess.)



(Testimony of Albert J. Aukers.)

Q. By Mr. Haight): Mr. Aukers, are you familiar with the construction of the oil seals illustrated and described in the Gits patent 2,052,762?

A. I am.

Q. Will you describe that construction to the court? And, if your Honor please, may the witness step down and use the large chart in describing the structure?

A. It is best to use in describing the structure the cross section illustrations such as Fig. 3, Fig. 2, and Fig. 4. Fig. 3 shows a peripheral portion No. 1, a cup bottom 2, and an axially inwardly offset radial flange 4.

Fig. 2 shows the molded resilient sealing member having the axial portion 6, and the sealing lip portion sub 5, around which is placed a mechanical coil spring 10. In Fig. 4 we have an expander ring 11, having two radial portions on it, encompassing the section 12. Those three components are assembled as shown in Fig. 5, with the axial portion of the molded resilient sealing member inserted into the depression of Fig. 5, as indicated in item 3; therein is placed the expander ring as indicated in Fig. 4. Then the complete assembly is expanded in Fig. 1 by a swedging or rolling operation [118] on the expander ring forcing it outward. Upon this action of the outward force and axial portion of the resilient molded sealing member 6 is forced outward in relation to the axially inwardly offset radial flange 4, such that portions of it are displaced around to the outward radial face and the resilient sealing mem-



(Testimony of Albert J. Aukers.)

ber is bonded to both sides of the radial face, and in that same action the sealing material is forced into the portion between the two radial walls of the expander ring and that results in the structure as shown in Fig. 1.

Q. How about Fig. 6, what does that illustrate?

A. Fig. 6 differs from Fig. 1 in that the molded resilient sealing member is leather. All other physical operations of the assembly are similar.

Q. Will you return to the stand and turn to the patent, itself, Mr. Aukers? I call your particular attention to column 1, page 1, beginning at line 39. Will you read that, please?

The Court: Is that in the book?

Mr. Haight: That is in the book. I was directing the witness' attention to column 1, page 1, beginning at line 39. Will you proceed, Mr. Aukers?

A. "In the forms shown in the drawing, the improved oil seal comprises a cup-shaped cylindrical shell having an inwardly extending flange at one end, the margin of which defines an annular aperture in which an axially-extending sleeve-like packing member is inserted and clamped by means of an expanded [119] clamping ring arranged to clamp one end of the packing member against the edge of the inwardly-extending flange."

Q. Now, that is true that you described on these figures?

A. Yes.

Q. Now, the next sentence immediately following, Mr. Aukers.

A. "The packing member is preferably molded

(Testimony of Albert J. Aukers.)

from a suitable flexible material, such as synthetic rubber or the like, and is formed with integral external peripheral shoulders, one of which engages the flange of the housing to help secure the packing member to the housing and the other of which serves as a retaining means for a contractible spring surrounding the shaft-engaging portion of the packing."

Q. In respect to molded packing material, you said that No. 6 figure illustrates leather instead of a synthetic sealing member. A. I did.

Q. Is that leather molded? A. Yes.

Q. What is the custom in this art in regard to the treatment or handling of leather in order to make the sealing elements?

A. Upon completion of the tanning or other treatment operations it is formed in molds in a press.

Q. I call your attention to column 2 on the same page of the Gits patent, and I will read:

"As shown in the drawing, the improved seal housing or shell 1 is formed with an integral inwardly-extending flange 2 at one end and the inner margin of the flange 2, [120] which is annular and defines an annular aperture 3, is offset inwardly as at 4, the ange 2 and the offset portion 4 extending in a generally radial direction and at right angles to the side walls of the shell or housing, 1."

Where is that on this easel?

A. It is this portion right here, following through from the peripheral portion 1.

(Testimony of Albert J. Aukers.)

Q. Will you then describe the cause of that particular formation, this flange marked 2, this offset portion, and then the extending of the ange downwardly—what is the resiliency effect upon the bottom of the cup?

A. In forming the cup member shown you have the peripheral portion and the cup bottom as indicated in 2, and then the next forming operation is one that is axial and inwardly in the offset so that a radial flange is formed in relation to the radial portion 2.

Q. That is O.K., but what about the cup bottom, this portion here? How does it look, looking at it from this direction?

A. The cup bottom is radial in reference to the peripheral portion. [121]

Mr. Haight: Well, I don't want to lead, but it will be helpful.

Q. Is the central part of the cup member as I indicated, the bottom, inset? A. Definitely.

Q. O.K. I think I will go more rapidly, Mr. Aukers, if you will stay down here and point out to the Court and I will do the reading; we will make progress that way.

I am now calling attention to page one of the same Gits patent, column two, beginning at line twenty four:

“An external peripheral shoulder 8”

—Where is that?

A. There (indicating).

Q. (Continuing)—

(Testimony of Albert J. Aukers.)

“is provided adjacent to the end of the clamping portion of the packing member and an annular counter bore or seat 9.”

Where is that?

A. Right there (indicating).

Q. Continuing——

“is formed in that end because of the offset arrangement of the clamping portion 6.”

Where is the offset upon which the clamping portion is fixed?      A. Right there (indicating).

Q. Where is it in Figure 1?

A. Right there (indicating).

Q. Again, the same page, column two, line forty-three, I read:

“The packing member is preferably molded of a flexible [122] substance having superior wearing qualities and which will not be affected or deteriorated by oil or grease. The substance known as Koroseal, manufactured by the Goodrich Rubber Company, is found to have suitable properties for this purpose and to give excellent results.”

What is Koroseal?

A. Koroseal is a synthetic resin known as a polyvinyl chloride. It has various properties, of which for oil seals a resistance to oil is an important factor.

Mr. Haight: In passing, your Honor, that was the material referred to and used in the Gits structure as shown in the depositions.

(Testimony of Albert J. Aukers.)

Q. And I continue to read at line fifty:

“A clamping member comprising an annular ductile ring 11 is utilized to secure the packing member to the flange of the shell or housing 1.”

That you have described.

I turn to page two, column one, beginning at line twenty six:

“Thus, when the slamping ring is expanded to secure the packing member to the shell flange, the clamping portion 6 of the packing member is forced into the groove 12.”

Where is that? A. Right there (indicating).

Q. I continue the reading:

“and at the same time that portion of the packing member that extends beyond or outside of the shell flange is [123] extruded over the edge thereof so as to overlap its margin as at 13 in Figure 1.”

A. Right there (indicating). And of course equally right there, that portion (indicating).

Q. “In this way the packing member is secured to the shell flange in such a manner that it is immovable relative thereto in either axial direction.”

I will read again, page two, column one, beginning at line thirty seven. I read:

“As shown in Figures 1 and 5, the offset portion of the flange 2”——



(Testimony of Albert J. Aukers.)

Point that out as right there (indicating). Continuing the reading:

“is disposed inwardly relative to the end of the shell a sufficient distance so that the outer end of the clamping portion 6 and the outer face of the clamping ring 11 will be flush with the end face of the shell 1.”

A. 12, 6 (pointing).

Q. “Thus, when the seal is inserted in a housing it may flatly abut the inner end of the housing or any other means that might come into engagement with the seal when it is in operative position.”

I shall not call the witness' attention to further matter in the specification, but when it comes to argument I shall call attention to features of claims one, three, five and seven. [124]

Will you now turn, Mr. Aukers, to a representation of the Peterson structure. Just a moment until I find the Peterson patent. The Peterson patent, your Honor——

The Court: I have it.

Mr. Haight: ——is No. 2,114,908.

Q. Are you familiar with the structure of that Peterson patent?      A. I am.

Q. Will you turn to the representation enlargement of the Peterson drawings on the big chart before you and explain the construction to the Court?

A. Figure 5 of the structure is an oil seal having

(Testimony of Albert J. Aukers.)

a peripheral portion 20; a cup bottom; an axially inwardly offset radial flange with axial extension. The molded resilient sealing member is bonded to the axially inwardly offset radial flange by an adhesive. The outer radial face of the molded resilient sealing member lies within the plane of the cup's bottom. The portion of the smallest axial inner dimension and radial section is there for protection to the lip of the element in handling and processing.

Q. In connection with that patent I call attention to the specifications, page one, column one, beginning at line forty nine:

“The improved molded grease retainer of this invention is composed of a minimum of parts including specifically the flexible packing or diaphragm 10 which may be of [125] leather or some synthetic material, and this can be of different shapes or dimensions, two representative shapes being shown in Figures 2 and 4, respectively.”

And then in regard to the attachment of the packing element, I call attention to column two on that same page:

“the packing element 10 is attached to the inner face of the support or housing 14 by means of some suitable adhesive such as a synthetic resin composition or some other adhesive, as, for example, casein,”

(Testimony of Albert J. Aukers.)

and again in the same column, beginning at line thirty one:

“In Figures 3 and 4, the packing element 16 is of a slightly different shape which has been found such as to eliminate the necessity of a constricting element, and this is mounted in a synthetic housing 18 by suitable cementing or otherwise, it being noted in this instance that the housing is shaped to accommodate the exterior face of the packing element.”

In this present disclosure of what material does he make the housing itself?

A. The material on the housing of Figure 5 is steel.

Q. And again in column two on page one:

“As shown in Figure 5, the housing 20 may be of metal, either sheet metal formed into channel shape as shown or it may be die cast either open or solid, and the diaphragm 22 can be attached to the corresponding portion [126] of the housing or shell by a suitable adhesive or in some other manner.”

I think I will pause at this time and take that big chart of the patent in suit. This will justify what I have just read in regard to the attachment “on in some other manner.” At this time, Mr. Aukers, I am not going into the details of the Johnson patent, but you are familiar with that patent in suit, with its construction?

A. I am, sir.

(Testimony of Albert J. Aukers.)

Q. Will you describe to the Court the different methods of attaching the sealing element to the shell that are illustrated and described in the Johnson patent itself?

A. Figure 1 presents a method of bonding wherein the radial flange is sandblasted and coated with cement and the resilient sealing material bonded through vulcanization and the use of the cement.

The sealing member 14 is also bonded to the radial flange by the flow of the rubber through the perforations.

And coming to Figure 2, the sealing member is bonded to two radial flanges, one being the cup bottom, the other being a washer, by means of clamping by the pressure of 34 against the inner structures. It is also bonded to the radial flanges by means of flow of the molded resilient material into the perforations of the inner flange. It is also bonded by the aid of the indentations 32.

Figure 4 shows a method wherein the sealing member— [127] molded resilient sealing member is bonded to the two adjacent radial flanges by means of clamping the pressure being against the inner structure by 34. The cup bottom has perforations and the molded resilient member is initially bonded to it by the flow of the rubber into the perforations.

Figure 5 and Figure 6 are duplicates of Figure 1 in process of bonding.

The Court: May I ask a question?

Mr. Haight: Certainly.



(Testimony of Albert J. Aukers.)

The Court: It doesn't interrupt your line of thought?

Mr. Haight: Oh, not at all.

The Court: Q. When you speak of molding, is the rubber poured in a liquid state into the mold?

A. In molding any member such as a sealing member, sir, you have a mold which is shaped to the contour shell of the finished article. So you place in that either sheet material or any form that you have, and the heat and pressure molds it, or, better saying, conforms it to the shape that you desire.

Q. For use in the seal itself?

A. For use in an oil seal, yes, sir.

Mr. Haight: Q. Now we will turn to Chandler. We have a big drawing of that.

I am calling your attention now to the Chandler patent, No. 1,905,800, applied for August 16, 1932, and issued April 25, 1933. Are you familiar with the construction illustrated [128] and described in that patent, Mr. Aukers? A. I am.

Q. Will you tell the Court what that construction is?

A. In order to describe the construction I desire to first describe Figure 3. Figure 3 shows the primary shell which has a peripheral portion 10, a cup bottom 14, and an axially inwardly offset radial flange 18. And it is upon the formation of this structure a space is resultant axially between the axial portion of the axially inwardly offset flange and the outer portion of the peripheral wall. The molded resilient sealing member is placed therein,



(Testimony of Albert J. Aukers.)

and upon a mechanical swedging operation applied at the radius of the axially inwardly offset portion of the radial flange, the flange that was initially radial is inclined by means of that operation. A force is applied resulting in bonding of the molded resilient sealing member between the axially inwardly offset flange as inclined and the other peripheral portion as shown.

Continuing, there is placed on the sealing member a coiled garter spring, which spring functions to retain the sealing member against the shaft during its operation of rotation, reciprocation or oscillation. The final portion of the sealed structure as you see is where in the portion 30 of the periphery is formed over to function to retain the garter spring and protect the edge of the element. And this view shows very clearly a cross section of seal in an application. It shows that here we have a shaft which operates in rotation, [129] reciprocation or oscillation. It shows a bore in a housing. It shows a shoulder against which the seal rests. Thus, the seal is pressed into the assembly from this direction, or, as I look at the chart from left to right, with the proper mounting tool and ends in the position as shown. Now in respect to that patent, I call attention to page one, column one, beginning at about line thirty three, and I read:

“The ring shown in the illustrated embodiment of the invention comprises essentially a one-piece housing which is drawn and spun by successive operations into the final desired

(Testimony of Albert J. Aukers.)

shape, a circular packing of leather or the like which is immovably clamped within the housing,"

that is the point you are indicating?

A. Yes, sir.

Q. And again, beginning at line fifty, at the bottom of column one, I read:

"Clamped within the housing is a circular leather packing having an inner axial portion adapted for engagement with the shaft, and an offset portion rigidly clamped within the housing not only to hold the packing but to seal against leakage of oil and grease between the packing and housing."

Now where is that offset portion?

A. Right there, sir.

Q. Now Mr. Johnson was making, as I thought, it very clear as to where you have to guard against the passage of oil. What [130] are those points as illustrated in the Chandler oil seal?

A. There are two points you have to guard against the passage of oil—along the axis of the shaft or along that outer portion of the shaft which is sealed by means of the axial portion of the sealing member. You also have to guard against the passage of oil by its passage into the inner structure of the shell and through the bonded section.

Q. Yes. And then what about this point up here?

(Testimony of Albert J. Aukers.)

A. You do have to guard against leakage or passage of oil due to the necessity of a proper press-fit of the outer periphery of the seal and the bore of the housing. In all instances the o. d. or outer periphery of the seal is slightly larger than the bore into which it is pressed, and it is then that inner pressing that gives us the seal at the outer peripheral junction of the bore and the seal o. d.

The Court: Q. You use the term "bonded"; is that different from clamping?

A. No, bonding—clamping is just another means of bonding, sir.

Q. Bonding is any means by which there can be a secure affixation of a thing that you want to put in there?

A. That is right, sir.

Q. Whatever it is?

A. Whatever it is, as long as you confine it.

Mr. Haight: Now I am not going to read the method of constructing this, but I will call attention to page one, [131] column two, beginning at line eight four, and I read:

"The two portions of the packing, namely the clamping and sealing portions, are connected by an inclined wall to avoid the formation of sharp or abrupt shoulders in the packing, and offset the reduced portion of the packing in an axial direction from the larger clamping portion."

Will you point that out again?

(Testimony of Albert J. Aukers.)

A. Right there (indicating). This is what is swedged in an inclined plane.

Mr. Haight: I shall not at this time, your Honor, but later I shall call attention to some material and in the specifications on page two, but I think it is clear and need no explanation from this engineer, whom I do not offer as a patent expert; I am just having him help us on the constructions.

Next we will turn to the Winter patent. We have no large drawing of that.

By the way, your Honor, is there any question in your Honor's mind as to how these seals are mounted now?

The Court: As to how they are what?

Mr. Haight: How they are mounted and how they serve. Here is a seal. You prevent the oil from going through here by the press-fit; you prevent it from going around here by the grip, bonding; and you prevent it from going through here by a lip. They are all the same in that regards; they all must function in that way. [132]

Now on the Winter patent we have no large drawing of that. Have you one of these enlargements of the photostats (handing the paper to the witness)? A. I have.

Q. That is Winter. Now, Mr. Aukers, are you familiar with the construction of this Winter patent as shown in the drawings and described in patent No. 2,089,461? A. I am.

Q. Will you describe that construction to the



(Testimony of Albert J. Aukers.)

Court? And I wish to call particular attention to Figure 5.

A. Figure 5 is the structure of an oil seal having a peripheral portion 13 a cup bottom 26, an axially inwardly offset flange 16. The molded resilient sealing member is bonded to the inwardly offset flange 16 by means of clamping, and the leading edge of flange 16 is inturned into the molded resilient sealing member. A coiled garter spring is placed on the inner axial portion of the sealing member for its proper retention against a rotating shaft, and the portion 22 is formed over from the peripheral portion 13 to retain the spring in its position.

Mr. Haight: Is that construction clear to your Honor?

The Court: Yes, I have it.

Mr. Haight: Q. All right. I call your attention to certain parts of the specification, page one, column two, beginning at line sixteen:

“The channel 16”—that the witness has pointed out—and I read: [133]

“receives one edge portion 17 of a sealing ring composed preferably of leather and in order to positively secure the ring in the channel and in a sealing manner therein, the free leg of the channel may be bent outwardly as indicated at 18 so as to crimp the leather where it enters the channel.”

And in the same column, line forty one, I read:



(Testimony of Albert J. Aukers.)

“The advantage of this turned-in wall 22 is that a separate washer for holding the spring in place is not necessary.”

Also on page two, column two, I read——

Mr. Owen: What line, please?

Mr. Haight: From line seven to line fifteen:

“The sealing ring shown by Fig. 10 and which may be used in the seal shown by Fig. 5 and others, may be formed from the ring 35 by outwardly turning and molding the flange 27 without deforming the portion 28. In this construction also the portion 28 which engages the shaft is not deformed and consists of leather in its natural grain condition.”

Continuing:

“While the leather ring is employed preferably joined and cemented as indicated at 34 in Fig. 2, it is possible to use other materials and even leather and to provide a ring without any joints.”

Where is that cementing in this Winter structure?

A. The cementing referred to in the last part read is to the Figure 9 wherein the molded resilient sealing member in itself is in a cemented form for economy and manufacture.

Q. I also call attention to page four of the specification, column one, beginning at line eight:

“and including an outer cylindrical wall for pressed-fit engagement with the housing and a centrally apertured end wall which is formed

(Testimony of Albert J. Aukers.)

as an integral part of the outer wall and extends inwardly from one end of the latter, and means on the end wall in inwardly spaced relation to the outer wall for attaching the large diameter portion of the packing ring to the end wall, said packing ring being attached to and supported solely from the end wall independently of the outer wall, with the attaching means and the packing set inwardly from the outer wall."

Where is that construction illustrated in the drawing?

A. That construction is shown in Figure 1 and Figure 5. It is that portion that bonds the molded resilient sealing element by clamping within the flange 16.

Q. Will you now turn to Fitzgerald, we have a large drawing of that. Mr. Aukers, I am calling your attention to the Fitzgerald patent, No. 1,983,746, filed January 17, 1934, issued December 11, 1934.

Mr. Haight: Have you it, your Honor?

The Court: Yes. [135]

Mr. Haight: Q. Are you familiar with the construction shown in the drawings and in the specifications of this Fitzgerald patent, Mr. Aukers?

A. I am.

Q. Will you describe that structure? Use the large chart.

A. Using Figure 1 of the chart, the structure of the seal is one having an outer peripheral por-

(Testimony of Albert J. Aukers.)

tion 20, a cup bottom 19, an axially inwardly offset radial flange 16. The molded resilient sealing member 11 is bonded to the axially inwardly offset radial flange by clamping between its inner portion and the adjacent radial wall the top channel wherein the turned over portion 21 applies clamping pressure for bond. The coil spring 12 rests on the sealing element in its axial position for positive retention of the element on the shaft and for satisfactory seal therein. The Z-shaped channel is described as the top channel. It functions to retain the coil garter spring on the sealing lip of the member and to protect the sealing lip edge. It is to be noticed that the radial wall 16 is inwardly offset axially in relation to the cup bottom 19.

Q. And that cup bottom is of what conformation?

A. The cup bottom portion is radial at this point.

Q. And there is a depressed portion in its center, is there not?

A. That is right, which axially inwardly offset and that depressed portion is radial.

Q. Is there any advantage in having that rim on the cup bottom [136] that is indicated as 19 in the Fitzgerald structure?

A. The rim portion as shown has the advantage wherein it can be a protecting edge for the material and where force is applied to press it into a housing.

(Testimony of Albert J. Aukers.)

Q. How do you press it into a housing? Do you use a tool? A. Yes.

Q. And where do you apply the tool?

A. The tool is applied against the radial face 19, and the force in mounting into a housing is applied from this direction from left to right.

Q. Why isn't the tool applied in this depressed portion indicated along that lead line from the numeral 16?

A. Normally in pressing in a metal encased oil seal such as this or equivalent structures, a positive amount of force or pressure is required because the outside diameter of the seal is larger than the bore into which it is pressed. The average figure for a seal of a one and one-half inch shaft is four to five thousandths of an inch larger. Therefore it is important, and very important, that the force of pressure inward, by any means that you use, whether it be a blow with a hammer or with a flat tool, or with a hydraulic press, that the pressure be applied at that point where no distortion of the seal is possible and if the mounting tool is smaller in diameter than the radial wall force 19, all of that force will then be applied on this inner radial face. It's manufactured from relatively thin metal so that upon that force the plate [137] would be displaced outward causing an outward turn of the element and the seal would not function satisfactorily.

Q. All right. I wish to call attention to two or

(Testimony of Albert J. Aukers.)

three matters in these specifications. Page one, column one, and I read at line sixteen:

“The invention, therefore, comprises in combination a flexible packing member and helical spring, a cage enclosing said packing and spring, said cage comprising an ogee annulus and a second section having a return bend forming an external annular bead and with the edge peened over the ogee member to clamp the flexible packing member between a flange of the ogee member and the side wall of the companion member.”

Where is that ogee member?

A. The ogee member is this top channel portion described initially.

Q. I read again on the same page, same column, beginning at line thirty-four:

“The oil excluding ring which forms the subject-matter of this application is adapted to be employed in conjunction with a rod or shaft 10, which may be a rotating shaft or a reciprocating shaft, or may be stationary and the ring may rotate or reciprocate relative thereto.”

Now there are three different uses, as I understand it, described there. Will you explain them? [138]

A. One, the first use would be where the seal would be mounted into a bore in a housing and the shaft would rotate. The second would be where the same seal would be mounted in a housing and the shaft would reciprocate. The third application



(Testimony of Albert J. Aukers.)

would be one where the seal—the shaft would remain stationary and the housing into which the seal is pressed would rotate upon the shafts axis so that the shaft would stand still and the seal assembly into which it is pressed would rotate.

Q. Speaking generally of these oil seals, is it true that they are adapted to be used where the shaft rotates, or where the shaft reciprocates, or where the shaft remains still and the mechanism to which the oil seal is attached rotates?

A. Definitely, yes, sir.

Q. I read again from column two, beginning at line six, of the same page:

“The other member of the cage comprises a substantially plane part 16 at its outer edge bent at 17 to form one side of a U-bend 18 which produces an external bead 19. The opposite side of the U-bend provides a substantially cylindrical part 20 which is peened over the outwardly extending flange 13 of the ogee member, as shown at 21.”

I also want to read a summary found in claim one, and I begin at line thirty five: [139]

“a pair of annuli clamping the annular part there between, said cylindrical part extending through and beyond one annulus, and a return bend integral with the annuli forming a bead extending opposite from the cylindrical part and increasing the external bearing surface.”

Will you now turn to the Frumveller patent.

(Testimony of Albert J. Aukers.)

The Court: I think we will take the noon recess at this time.

Mr. Haight: I think your Honor will be interested to know that I have taken care of five out of twelve devices I am going to ask this witness about, and then the others I shall try to explain myself; with what success remains to be seen.

(Thereupon a recess was taken until 2:00 p.m. this date.) [140]

Afternoon Session, Thursday, January 24, 1946  
2:00 P.M.

ALBERT J. AUKERS

recalled as a witness for defendant; previously sworn.

Direct Examination  
(Resumed)

By Mr. Haight:

Q. Mr. Aukers, I now draw your attention to the Frumveller patent, No. 1,617,587, filed September 2, 1924, issued February 15, 1927. Are you familiar with the construction as shown in the drawings and described in that patent? A. I am.

Q. Will you explain the construction? We have no large drawing of that. Here is one of the semi-enlarged ones.

A. I wish to refer to Figure 4 and describe the application of the invention. The invention is one wherein a connection—pipe connection is made to seal on a ball joint, and between it and the socket

(Testimony of Albert J. Aukers.)

member. You will note that the angled face of the sealing member 42 rests against the ball joint and that the angular radial portion of the retaining flange is clamped within the two sections of the socket member. There is applied axially a coil spring forced on the structure to assist in seal.

Referring to Figure 5, the description of the structure is as follows: A metal diaphragm——

Q. Wait a minute. If you read from anything, state where you are reading.

A. I am not reading yet. [141]

Q. O.K.

A. A metal diaphragm has a radial portion 43, an axially inwardly extending flanged portion 44, having two axial steps connected by inclined portion 45. A molded resilient sealing member is bonded to both sides of the larger diameter axial flanged portion and the adjacent inclined portion. The bonding is by means of chemical adhesion.

Q. Looking at Figure 5, where is the sealing member?

A. The sealing member is portion 41 and face 42 of that member is pressed against the ball joint to seal.

Q. The sealing member is that darkest part which is cross hatched in the drawing, isn't it?

A. Yes, sir.

Q. And what is that member, as I read it, is reference 45 that extends into it?

A. That is the inclined portion of the axial flange.

(Testimony of Albert J. Aukers.)

Q. And is it offset at any point?

A. Yes, sir, it is offset at the larger diameter axial portion that doesn't have any number and is an extension of 45.

Q. And what is this device used for according to the disclosure of the Frumveller patent?

A. Well, quoting from the patent, column one, line ten through fourteen:

“The invention is intended particularly for use as a part of a flexible pipe connection between the steam or air pipes of adjacent cars of a railway train.”

End of quotation. [142]

Q. I call your attention to page two, column one of the page, and I read beginning at line forty-two:

“The sealing device now to be described, forming the principal feature of the present invention, is adapted to maintain a fluid-tight joint between the ball and socket members of the flexible pipe connection at all times, while permitting free angular and rotative movement of the ball member within the socket. The gasket 30, which is formed of a hard rubber composition or similar material, has a cylindrical outer surface adapted to fit snugly within the recess 2 in the socket member and be longitudinally slidable therein.”

What would be the practicability of inserting a shaft in the place of that socket member?

A. That can be done practically.

(Testimony of Albert J. Aukers.)

Q. I notice that the figures that you have called attention to, to wit, the Figures 4 and 5, are described on page two of the patent beginning in the second column at line 103. Will you read that portion, please?

A. "In the modified form of the apparatus, shown in Figs. 4 and 5, the gasket 41 has its forward inner face curved as before, at 42, to engage the inner end of the ball member. The flat flexible diaphragm 43, extends completely across the rear end of gasket 41, and has a short cylindrical flange 44 extending into the open rear [143] end of the gasket and an outwardly flaring skirt 45 embedded within the gasket. A metallic sheathing or casing 46 surrounds the outer cylindrical surface of gasket 41 between the gasket and the socket member."

Q. And that flaring skirt 45 is the member with its angular portion that you pointed out in Figure 5 in that dark cross-hatched portion, is that right?

A. It is, sir.

Q. Now calling your attention to page three of the patent, column two, beginning at line eighty-seven, I read simply the phrase:

"an annular flexible diaphragm having one edge embedded in the gasket, and secured at the other edge to the socket member."

As you read it, to what structure does that refer?

A. That refers to diaphragm 43 on my Figure 5.



(Testimony of Albert J. Aukers.)

Q. We will now turn to the Penick patent. We have a large drawing of that.

I call your attention to the patent to Penick, No. 1,817,095, filed April 29, 1929, and issued August 4, 1931. Are you familiar with the structure found in the drawings and described in the specification in that patent? A. I am, sir.

Q. Will you describe it, pointing out the principle as you refer to them on this big drawing?

A. Figure 1 shows a cross section of a novel pump packing [144] assembly. The functional parts are parts 6 and 5 which are the sealing means on the movable plunger identified on the shaft as 14. The sealing means 6 and 5 are assembled in the pump portion against number 7 with controllable pressure applied by means of portion 16 through pressure on screw 21.

Figure 2 shows a detailed structure of the sealing means in the assembly. Part 6' is angular portion which has in it perforations or holes 12, and an offset or suture portion 11'. A molded resilient sealing member is bonded to both sides of the sutured or flanged portion, and the resilient sealing material flows into the perforation to the outer annular face of the flange. It is to be noted that the rubber is bonded to both sides of the flange 11'.

Q. I notice that this patent is entitled "pump packing." Does that serve to act as a seal in any way, and if so, will you please explain.

A. Yes, it is a definite seal.

Q. What does it seal?

(Testimony of Albert J. Aukers.)

A. It seals a given fluid within the assembly chamber upon the motion of the plunger against seepage or bypass along the portion shown at the cross section and along faces adjacent to 11' of the packings.

Q. And the seal is between what parts of the structure shown in Figure 1?

A. The seal is between the outer diameter of the plunger and the bore in the housing portion of the pump.

Q. That is what I, as a farmer, would call its cylinder, I [145] take it.      A. Yes, sir.

Q. Now I am going to read a bit from the specifications of this patent, and I shall read slowly and I wish you would point out the structures as I go along. I call attention first to page one of the patent, column one, beginning at line forty:

“The inner margins of the plates 5, 6”——

Where are they?

A. (The witness indicates.)

Q. “——are faced with packing rings, as 8, 9,”——      A. That is 8, blue.

Q. “——formed of rubber, rubberized fabric, or other suitable packing material, which are connected, or joined to said plates by the sutures 10, 11.”

Where are they?

A. That is these little flanged portions shown there in the enlarged section in Figure 2 as 11'.

Q. And what color is it in Figure 2?

A. Red.

(Testimony of Albert J. Aukers.)

Q. "In the form shown in Figure 2 the plates, as 6', in addition to the suture 11', forming a connection between the plate and packing ring 9', is also provided with perforations, as 12, through which the material of the packing ring 9' is moulded to form additional means for securing said ring 9' to the plate 6'."

You have pointed those out as we have proceeded, have you not?      A. Yes, sir. [146]

Q. By the way, speaking of molded, I am calling your attention to one of the exhibits in the Gits depositions which are identified on the record, and this is Defendant's Exhibit No. M. Will you describe to the Court that construction.

A. The construction I have in my hand shows an expander ring molded—no, an expander ring held within the molded resilient sealing member and with the expander ring retained within an inset portion of the member on the inner diameter.

Q. And how is it gotten in there? How is it placed in there?

A. The ring is placed in there by means of initial pressure seemingly during a molding operation.

Q. Now that ring that is placed in there during the molding operation is what ring on the Gits patent? Let's take No. 5 for instance.

A. That is——

Q. Wait a minute. Is that 5?

A. That happens to be Figure 5, yes, sir.

Q. O.K.      A. That is the ring 11.

(Testimony of Albert J. Aukers.)

Mr. Haight: You see, your Honor, how small that is compared with the size of the drawing, but it was suggested to me by the molding that we struck in this patent.

Now I think we will go to another one now. The next one after Penick is Miller. There are two sheets that are enlarged that I am showing your Honor.

Q. I call your attention, Mr. Aukers, to the Miller patent, No. 2,004,669, filed September 9, 1932, issued from June 11, 1935, [147] and entitled "packing cup." Are you familiar with the construction disclosed in the drawings and described in the specification of that Miller patent? A. I am.

Q. Will you describe it, choosing such figures as you think will be helpful?

A. Yes, sir. Before proceeding with the description I wish to take the opportunity of explaining the cross section design and believe that quoting from the specification will quickly explain it.

Q. All right, proceed.

A. Page one, column one, line four through eight:

"More specifically, the invention relates to an improved vacuum controlled piston for an automobile clutch operating cylinder, the piston being of the type employing a composition packing cup."

End of quote.

Therefore, the piston is that part, referring to Figure 1, which is composed of shaft 5, nut 21,

(Testimony of Albert J. Aukers.)

flanges 6 and 7, and molded composition material 10. The assembly just described——

Q. Now wait just a moment. The shaft is 5 at the center?      A. Yes, sir.

Q. And what are those two members 6 and 7 that seem to be secured on the end of the shaft?

A. Those are two metal flanges.

Q. What shape are they?

A. They are disc shaped.

Q. Circular?      A. Circular. [148]

Q. And I notice something that is cross hatched at the ends between those two members. What is that?

A. That is the molded resilient cup packing or sealing member.

Q. All right. Will you now proceed?

A. The molded resilient cup material packing or sealing member 10 is bonded to the adjacent faces of the discs 6 and 7 by means of clamping. Figures 2 and 3 use the same method of bonding, that is, clamping. And Figure 5——

Q. That is on another sheet, is it not?

A. The next page. Figure 5 shows a radial portion 7, which is part of a disc, and to it is bonded a molded resilient sealing member 26. The plate 7 is initially brass plated, and in the molding operation the resilient composition material is bonded to both sides of plate 7 on the outer periphery of the radial portion at the incline as shown so that it is on both sides of that inclined portion——



(Testimony of Albert J. Aukers.)

Q. Now wait a minute. In Figure 5 we have the shaft 5 in the center? A. Right.

Q. And then we have this plate 7 that is secured on its end and held by the nut 21 apparently, is that right? A. Yes, sir.

Q. Now the sealing member is that element up at the end or the periphery of the disc-like member and you said it was bonded to both sides. Both sides of what and where?

A. It is bonded to both sides of plate 7.

Q. Yes.

A. At the outer inclined portion of the plate.

Q. All right. Will you now proceed?

A. Figure 7 shows a further assembly composed of shaft 5, nut 21, and plate 6. And in this instance the molded resilient sealing member is bonded to one side of plate 6, on the side to the right of the drawing sketch in my hand.

Q. And how is the bonding effected there?

A. By initial use of brass plate and chemical adhesion.

Q. Now I call your attention to page one of the specification of this patent and down at the bottom, line fifty-five, where it refers to Figure 5, I read:

“Fig. 5 is a sectional view of a cylinder and piston in which the packing cup is molded to the piston disc.”

And then in respect to 7, I find in column two, line 4 and following, this:

“Fig. 7 is a sectional view of a cylinder and

(Testimony of Albert J. Aukers.)

piston showing another form of unitary piston disc and packing cup construction.”

And down that same column at line twenty-two I read:

“According to the invention, a rubber composition packing cup is clamped between the outer ends of the two discs 6 and 7.”

What function does the packing element serve in the structures to which you have referred?

A. The packing element functions to act as a vacuum seal within the assembly sealing within the inner walls of the cylinder. [150]

Q. I call your attention to page two in regard to the structure at the bottom of column one, at line sixty-two. Will you read that?

A. “In the construction disclosed in Figs. 1, 2 and 3, the packing cup is held between the ends of the two piston plates or discs 6 and 7. According to the construction illustrated in Fig. 5, a packing cup 26 is permanently molded onto the piston disc 7, thereby eliminating the use for the piston disc 6. In order to secure the packing cup 26 to the piston disc, the surface of the disc upon which the composition packing cup is to be molded, is first brass plated and then the cup is molded onto the disc and the adhesion of the molded cup to the brass plated disc is such as not to require a follower or compression disc as employed in the construction shown in Fig. 1.”

(Testimony of Albert J. Aukers.)

Q. Then on further description, I call your attention to column two on page two beginning at line eight. Will you read that on the record, please?

A. "It will be noted that a portion of the flared end of the piston disc 7 extends into the body of the packing cup, so that the packing cup is molded over the end of and part way down the right hand side of said disc. This is done in order to better ensure that atmospheric pressure in chamber 16 will not tear the packing cup from the piston [151] disc 7 when the pressure in chamber 17 is reduced."

Q. And then some of the other constructions are referred to in the following six or seven lines. Will you read those?

A. "The construction illustrated in Fig. 7 is very similar to that in Fig. 5, except that the packing cup 28, which is similar to the cup shown in Fig. 1, is permanently molded to the piston disc 6 instead of to the piston disc 7, and according to this construction the packing cup is on the right hand side of the piston disc 6 and subject to the atmospheric pressure in chamber 16, so that in operation there is no tendency for the packing cup to be torn from the piston disc."

Q. Now is there any sealing function performed by any parts of these structures?      A. Yes.

Q. What?

A. The function of seal is performed by the

(Testimony of Albert J. Aukers.)

complete assembly of the piston as described previously, particularly as sealed within the cylinder against which rests the molded resilient sealing material.

Q. And in this particular patent what is the device for?

A. The device is for a vacuum controlled piston in an automobile clutch operating cylinder.

Q. So what is sealed?

A. Well, you seal air.

Q. All right. Now just summarize a bit, in the sealing part what different methods are disclosed in this patent as securing the sealing element?

A. In Figure 1 the sealing [152] element is bonded to the discs 6 and 7 by clamping.

Q. All right.

A. In Figure 5 the sealing disc—the sealing member is bonded to both sides of the disc 7 by means of chemical adhesion and the use of brass plate?

A. Figure 7 is bonded to the disc 6 by chemical adhesion and the use of brass plate.

Q. Is that bonded to one side?

A. That is bonded to one side, yes, sir.

Q. Now what does the brass have to do with the adhesion, if anything?

A. The brass assists in obtaining good adhesion.

Q. Will you next turn to the Heinze patent. Again we have no large drawing. I mean Heinze '403, originally filed April 9, 1934, and issued February 23, 1937. Are you familiar with the construc-

(Testimony of Albert J. Aukers.)

tion disclosed in that patent?

A. I am, sir.

Q. Will you describe it, please, and don't go too rapidly.

A. Referring to Figure 1, the structure shows a metal encased oil seal assembly having a peripheral portion and an axially inwardly offset flange 12, with inturned portion axially 14. A molded resilient sealing member 18 is bonded to the axially inwardly offset flange and the adjacent radial flange 16 by clamping. It is to be noted that the leading edge of the axial portion 14 is imbedded into the resilient sealing member to assist in improved bond.

Referring to Figure 2, this structure shows an oil seal [153] having a peripheral portion with axially inwardly offset U-shaped radial flange. The molded resilient sealing member is bonded to the adjacent sides of the U-shaped flange and the inturned portion is embedded into the sealing member for additional aid in bond.

Q. In that drawing of Figure 1, starting over at the inturned flange at 14 and going to the right where we find a lead line from 18, the drawing might be misleading. What do we see in that dotted portion in the drawing?

You see it runs a way down in the figure, Figure 1?

A. Yes.

Q. What is all that?

A. Well, the portion that is hatched, which is what I assume you mean by dotted——

Q. That is right.

A. ——is the molded resilient sealing member,



(Testimony of Albert J. Aukers.)

the outer axial portion of which is bonded to the section 14 and radial flange 16, and the inner smaller axial portion 18, which would rest on the shaft to seal with the pressure of the coiled garter spring 22.

Q. Where is the sealing lip in that seal?

A. The sealing lip is the edge—the righthand edge of portion 18.

Q. And is that oil sealing lip going down in a curved structure in the drawing?

A. That is right, sir; that is the sealing lip in the full circumference.

Q. Now I notice on the specification of this Heinze patent on page one, column one, beginning at line sixteen, the following, [154] and I read:

“Another important object of the invention is the provision in a grease retainer of an armored packing of leather or the like which, on account of its construction, shall provide a better resistance to blows or other extraneous forces directed against a grease retainer, particularly in efforts to place the same in position.”

Does that refer to the same matter that you described this forenoon?      A. It does, sir.

Q. In getting the press-fit to put it in place?

A. Yes, sir, that is the reinforcement that is used in some instances.

Q. Are there any other parts of that specification that you would like to refer to as making clear the structure?

(Testimony of Albert J. Aukers.)

A. I would like to read page one, column two, lines twelve through thirty for the description of Figure 1.

Q. Proceed.

A. "The reference numeral 10 indicates generally a casing for one of the improved grease retainers of this invention, the same preferably embodying an annular sheet metal cup-like element having the usual opening there through for the passage of a rotatable shaft about which the grease retainer is adapted to be mounted.

"Slidably fitted into the outer casing 10 is an [155] inner casing 12 which is approximately L-shaped in cross-section as best shown in Figure 1 and has an inwardly bent inner edge 14, which edge, together with a relatively thick metal washer 16, acts to clamp the offset annular rim of a packing element 18 which is preferably of leather or some similar flexible material. It will be noted that the inturned edge 14 of the element 12 closely grips the edge of the leather packing against the inner periphery of the washer 16, which is seated against the inner side face of the shell 12."

Mr. Haight: And there is one other part I would like to place on the record in that same column, page one, beginning at line forty seven. It refers to Figure 2 that you have described and I read:

"In Figure 2 is shown a modification of the

(Testimony of Albert J. Aukers.)

invention wherein an outer shell 24 is provided, and into this shell is fitted a combination armor and clamping element for the packing 26 which clamping element comprises a sheet metal annular structure 28, preferably U-shaped in cross-section as shown in Figure 2, one of the legs of which is shorter than the other and is turned inwardly as shown at 30 to provide a suitable clamping engagement with the in-turned end of the leather packing 26."

Now will you turn to the patent to Lord? We have a big [156] drawing of that.

Q. Your attention is directed, Mr. Aukers, to the patent to Lord, No. 1,996,210, filed June 23, 1931, and issued April 2, 1935. Are you familiar with the construction shown in that as described in the specifications? A. I am, sir.

Q. Will you describe this, referring particularly to Figure 1, Figure 8, I think, and Figure 10, or any others that you think will make the subject matter clear?

A. Initially, the purpose of the structure shown as Figure 1 is to act as a vibration dampener on any service wherein a unit such as an electric motor or the like in operation has some vibration and it is desired to seal that vibration from the adjacent table or other location wherein it is used, whether it be on the bottom of a washing machine or any unit. The method obtained in the vibration dampening is through the molded resilient sealing material.

Figure 1 shows a step portion having an axial

(Testimony of Albert J. Aukers.)

leg 3, inwardly inclined portion 2, and axial portion 1. The molded resilient sealing member is bonded to both sides of axial portion 1 by a surface union during vulcanization and is also bonded to the outer face of the cylindrical portion 4 in the same chemical bonding operation.

Figure 8 shows a structure wherein a flat plate 16 is used and the molded resilient sealing material is bonded to both sides of the plate 16 as shown in portion 18 by surface [157] union through vulcanization.

Figure 10 shows an L-channel having leg 22 and radial portion 21, and to the inner diameter of the L-channel as shown on the description section 26 is bonded a molded resilient sealing member through surface union and process of vulcanization.

Figure 11 shows an end view of Figure 10, and that can again be transmitted to indicate its application as in Figure 9, with two sections, one at each end of the electric motor for dampening the effect or sealing of vibration.

Q. Mr. Aukers, did you have to do with the coloring of these various figures that appear on many of these drawings, not only the big ones that we have been referring to but those that I mentioned earlier that we are going to bind together and hand to the Court later? Did you have anything to do with that? A. Yes, sir.

Q. Give us the key to your coloring? Is there a key that applies to all of these?

A. Very definitely, sir.

Q. Tell us what it is.

(Testimony of Albert J. Aukers.)

A. In all instances the metal portion of the structure as given is in red. In all instances the resilient sealing member is in blue.

Q. I notice some green over here.

A. Pardon me.

Q. On the one of the Johnson patent.

A. In the Johnson patent a further color is the color of green. That is the color applied on the channel that we call in our profession a [158] top channel.

Q. And that is usually of what material?

A. Metal.

Q. Now, Mr. Aukers, will you return to the stand for a moment please?

Mr. Haight: I would like to have this marked with our next exhibit number.

Mr. Owen: If your Honor please, before they are offered in evidence I would like to know more about where they come from.

Mr. Haight: If you give me a chance to examine the witness, both of us will find out.

Mr. Owen: Yes. Now you are marking them as an exhibit.

Mr. Haight: I am marking them for identification.

Mr. Owen: I beg your pardon.

Mr. Haight: I haven't offered them. I will if we can prove what they are.

The Court: Two exhibits?

Mr. Haight: There are three.

The Clerk: Fastened together, your Honor.



(Testimony of Albert J. Aukers.)

(The objects referred to were marked Defendant's Exhibits AAE for identification.)

Mr. Haight: Q. I have had marked for identification, and identification only at this time, three little structures for identification Defendant's Exhibit AAE. Are you familiar with those?

A. Yes, sir. [159]

Q. Did you have anything to do with the making of them? A. No, sir.

Q. Where did they come from?

A. They came from the Lord Manufacturing Company.

Q. And what do they represent?

A. They represent the vibration dampeners as described in Figure 1 and Figure 8 of Patent 1,996,210.

Q. Let me get this clear. You have three there. Does one of them represent one figure and one another? What is the fact?

A. Well, of the three, two of them represent Figure 1 and one represents—pardon me, one of them represents Figure 7 instead of Figure 8 as originally mentioned. That is right.

Q. Will you describe each of those structures?

A. The small cup-shaped metal portion shows bonding to the inner diameter of the formed cup and molder resilient sealing member and the sealing member is bonded to both sides of the cup portion. It is also bonded to the cylindrical portion in the center of this smallest diameter cup section. In both instances the bonding is by vulcanization.

(Testimony of Albert J. Aukers.)

The larger diameter cup section is identical in construction and bonding to the small diameter cup section.

The third portion as indicated in Figure 7 of patent 1,996,210 is an outer flat plate, to the sides of which on the inner diameter is bonded a molded resilient sealing [160] member, and it is bonded on both sides. On the inner diameter of the plate is a cylindrical portion, and the molded resilient sealing material is bonded to it.

Mr. Haight: If the Court please, these apparently are recent samples and have no authenticity except to illustrate the figures in the drawing. On that basis I offer them in evidence.

Mr. Owen: No objection.

The Court: Very well, they may be admitted.

(The objects were thereupon marked Defendant's Exhibit AAE in evidence.)

Mr. Haight: Q. Now, Mr. Aukers, turning to the Lord patent, is there any description of this bonding found therein?

A. Yes, I will read from the patent, page one, column one, line fourteen through nineteen:

"When an outer plate is used it is provided with an opening in which the joint is arranged. The rubber is secured by surface union, preferably by bonding during vulcanization to the faces of the plate along the periphery of the opening."

(Testimony of Albert J. Aukers.)

Continuing, if I may——

Q. If you please.

A. Page one, column two, line six through fifteen—no, line five through fifteen for greater clarity:

“The joint, as shown in Fig. 1, has a plate 1 with side flanges 2 terminating in feet 3. It is provided with a central member 4 and a rubber member 5, the rubber member extending at 6 along and preferably bonded during vulcanization to the central member 4 which is in the form of a tube and extending over and preferably bonded during vulcanization to the edges of an opening 7 in the plate 1 forming rings 8 of rubber on opposite faces of the plate adjacent to the periphery of the opening.”

Q. And there is a description in relation to Figure 8 that begins at the bottom of that same column. Will you put that on the record, please?

A. “In Fig. 8 a modified joint is shown in which there is an outer plate 16 having a joint opening arranged therein. A central member 17 is in the form of a plate, the outer periphery of the plate 17 being within the periphery of the opening in the plate 16. A rubber member 18 bridges the space between the plates 17 and 16 and has”——

Reading on the next page, page two, column one——

“has an extension 19 on the outer periphery bonded to the faces of the plate 16 adjacent to

(Testimony of Albert J. Aukers.)

the opening. The rubber likewise has extensions 20 on its inner periphery which extend over and are preferably bonded to the faces of the plate 17."

Q. And then down in the same column on page two, at line [162] fifty six, the following appears, which I read:

"In all of these joints it is preferable to secure the rubber to the joint members by bonding during vulcanization so that the rubber of the joint member is put under initial tension through the shrinkage of the rubber."

I think there are some other descriptions of that bonding. Here is one on page two, column two, line forty two. I read:

"In Fig. 3 buffing wheels 29 are shown operating simultaneously on the top and bottom of a plate, such as is used in the joint shown in Fig. 1. After the plate is properly processed for bonding the rubber 30 having a proper bonding face is laid on the top and bottom surfaces of the plate bridging the opening 7 in the plate."

There are some others, but I think that is enough, Mr. Aukers.

Now we will turn to the Anderson cut. We have no large drawing of that; we have one of the intermediate enlargements.

We direct your attention to the patent to Ander-



(Testimony of Albert J. Aukers.)

son, No. 2,013,333 filed March 17, 1933, issued September 3, 1935.

The Court: This is a process patent.

Mr. Haight: Yes, it is. This patent, as the Court has observed, relates to a method of producing oil seals. I think we can disregard the method unless it is helpful in [163] showing the construction. Are you familiar with the construction of the devices therein shown and described? A. Yes, I am.

Q. Will you tell us how they are comprised?

A. On Figure 3 I desire to describe the structure of the oil seal shown in the assembly. The oil seal has a peripheral portion 10, an axially inwardly offset radial flange 16—no, radial flange 22, pardon me; a molded resilient sealing member 16 is bonded to the in-turned edge of the radial flange 22 and the inner face of the peripheral portion 10.

The portion coil as shown in the structure is the radial portion spun over in the operation for the protection of the sealing member and garter spring 20.

Q. Now how is the sealing element secured in that seal?

A. The sealing element is secured in the seal by the embedding of the in-turned—out-turned radial portion of the axially inwardly offset radial flange 22 in the operation wherein it is clamped between the in-turned portion and the inner portion of the outer periphery. [164]

Q. Is there any part of the specification that



(Testimony of Albert J. Aukers.)

assists in describing that structure to which you wish to refer?           A. Yes, sir.

Q. Will you please do so?

A. Page 1, column 1, line 19 through 26:

“The cup drawn blank with the gasket and spring assembled therein is received in a mold cavity, and the upper and free edges of the cup drawn blank are curled inwardly and rearwardly to provide a circumferential space for enclosing the sealing end of the gasket, and rigidly clamping the outer sealing end of the gasket against the cylindrical wall of the housing.”

Continuing, page 1, column 1, lines 51 through 54:

“Enclosed within the housing is a flexible leather seal ring or gasket 14, having an outer clamping portion 16 extending axially within the cylindrical portion of the housing, and an inner sealing portion 18 also extending in an axial direction.”

Q. In respect to the material of which the sealing element is made, I call your attention to column 1 of page 1, line 14, and following:

“Thereafter a molded and shaped gasket of leather or the like having an outer clamping portion generally concentric with the wall of the shell and extending axially thereof is assembled together with a retaining spring.”

Mr. Haight: I think that sufficiently describes that one, if your Honor please. I shall turn now

(Testimony of Albert J. Aukers.)

to Heinze, 240. This patent is numbered 2,116,240, filed August 30, 1933, issued May 3, 1938, and entitled "Grease retainer with clamped packing." Are you familiar with the construction shown and described in that patent, Mr. Aukers?

A. I am, sir.

Q. Will you please describe the same? I think we will have you refer to Figs. 3, 6, 7, and 13 and any others that you think may be helpful in clarifying your description.

A. Referring to Fig. 3, we have a metal encased oil seal having an outer peripheral portion, an axially inwardly offset radial flange 28, having an axial inturned portion on the inner diameter. A molded resilient sealing member is bonded to the axially inwardly offset radial flange and the adjacent L-channel 30. The inturned portion of the radial flange on its smaller axial dimension is embedded into the sealing member for an aid in bond.

Fig. 6 shows a unitary—there is an oil seal structure having a peripheral portion, an axially inwardly offset radial flange 52, and an axially inturned portion on the flange. The molded resilient sealing member 50 is bonded to the adjacent sides of the axially inturned portion of the radial flange 52 and the wall of the radial washer 54. It is to be noted that the inturned portion of the radial flange 52 on the smaller axial dimension is embedded into the molded [166] resilient sealing member to aid in bond.

Fig. 7—

(Testimony of Albert J. Aukers.)

Q. Just a moment. What is that structure indicated by the numeral 58 in Fig. 6?

A. The structure 58 in Fig. 2 is a U-shaped structure which has an axially inturned portion resulting in the formed radial flange 52.

Q. You said Fig. 2. I wanted to know what is indicated by that part of Fig. 6 indicated by the numeral 58.

A. I read the description from Fig. 6.

Q. Oh, I see. I didn't know that.

A. I'm sorry, sir.

Q. When you read from the specification you must always make reference so that we know. But what is that structure 58, I will ask you, in Fig. 6?

A. The structure 58 in Fig. 6 is a U-shaped channel portion having a peripheral portion and axially inturned—inwardly inturned portion.

Q. How does the end of the sealing structure look when we look at the end of it from the right hand looking left?

A. The face 52 is inward in relation to face 58.

Q. Depressed in relation to the bead 58, is that right?

A. Well, the word "depressed" applies.

Q. Will you proceed with Fig. 7, please?

A. Fig. 7 shows a seal construction having a peripheral portion and an axially inwardly offset radial flange 62 with a small diameter axial portion. The molded resilient sealing member is bonded to the inturned portion of radial flange 62, and the C-shaped [167] channel 64. The leading edge of the

(Testimony of Albert J. Aukers.)

inturned portion of radial flange 62 is embedded into the molded resilient sealing member for aid in bonding.

Q. Now, turn to the next Fig. 13, please.

A. Fig. 13 shows an oil seal structure having a peripheral portion 112, and an axially inwardly offset radial flange with axially inturned portion. The flange mentioned is No. 108. The molded sealing member 106 is bonded to the adjacent sides of the member 108, and the inturned portion of the small diameter radial part of 108 is embedded in the molded resilient sealing member for aid in bond.

Q. Referring to the specification, column 1 page 1, I notice that these units are—and I quote beginning on line 11—

“so designed that the unit may be driven into position with regard to a shaft without any danger of damaging or mis-shaping the unit by such driving blows.”

That structure is illustrated in Fig. 6, is it not?

A. It is, sir.

Q. And on that same page of the specification, column 2, in regard to the sealing element, I notice beginning at line 17 the following, and I quote:

“In the various figures, there are shown certain types of grease retainers which embody essentially a resilient packing element preferably composed of leather and which is somewhat cylindrical in shape with one portion [168] of slightly larger diameter than the other.”



(Testimony of Albert J. Aukers.)

And that is again referred to at the very bottom of that column in the following beginning at line 53:

“a packing element 12 which is preferably composed of leather and which is somewhat cylindrical in shape,” etc.

Now, on page 2 is there any part of that specification that you wish to refer to?

A. Yes, sir, page 2, column 1, line 17 through 23:

“The gripping contact of the larger edge of the leather packing 12 is accomplished by an inward turning by spinning or the like of the upwardly turned inner edge of the cup-shaped element 10 after the washer 16 is in position in the cup, whereupon a tight gripping relationship of that edge of the leather packing results.”

Q. Will you describe Fig. 6? I notice a reference to that figure on page 2, column 2, beginning at line 20. Does that help clarify in any way?

A. Yes, sir.

Q. And will you read it, please?

A. “In the modification shown in Fig. 6, the packing 50 is made shorter, one edge, however, being gripped between a cup-shaped gripping element 52 and the inner face of an annular washer 54, this assembly being in turn inserted into a cup-shaped housing 56, the periphery of the larger end of this housing being bent downwardly and inwardly as shown



(Testimony of Albert J. Aukers.)

at 58 into a gripping contact with the outer face of the cup-shaped gripping element 52 whereby another unitary structure results which [169] is proof against hard usage and the like."

Q. There is a similar description of a modification in Fig. 7 immediately following, which we will not pause to read.

On page 3 at the bottom of column 1 reference is made to Fig. 13. I think that is helpful. Will you put it on the record?

A. "In the modification shown in Figure 13, the leather packing 106 is gripped at its edge of greater diameter by the shorter leg of a U-shaped gripping elemtn 108, the longer leg of which incloses the usual garter spring 110, and this assembly is then placed in an exterior housing 112 which acts as a protective structure which is reinforced by the U-shaped element 108. It will be noted that the inward bending of the shorter leg of the U-shaped element 108 forms a one-piece clamping structure."

The Court: I think we will take the afternoon recess at this time.

(Recess.) [170]

(Testimony of Albert J. Aukers.)

Q. In this art we have been discussing some patents refer to gaskets. Are those in any instances sealing members? A. Yes, they are.

Q. In the record many sealing materials are mentioned, Duprene and Neoprene, Hycar and Thiokol, as well as leather and composition material. In oil seals are those as they are used molded resilient sealing members? A. They are.

Q. What is the difference between Duprene and Neoprene?

A. The Duprene and Neoprene are identical. A change in name was desired by manufacturers to get the name Dupont out of it so it was changed to Neoprene.

Q. Some reference was made when Mr. Johnson was on the stand as to the use of oil seals as spacers. Are you familiar with any such use?

A. One use that I know of in my experience.

Q. What was that?

A. Some years ago a stoker manufacturer had a gear case assembly which was very unique, wherein he has bushings around the shaft and adjacent to the bushing he had to have an oil seal. The bushing had a tendency to slide back and forth so that the edge would come in contact and hammer against the seal inner flange, and in that instance we could not use any of our standard design seals, and we had to revert to a very special design having a washer twice the thickness of the standard thickness of metal as a reinforcement of the sealing member.

(Testimony of Albert J. Aukers.)

Q. Is there any or are there any reasons why oil seals [171] could not have been used?

A. Yes.

Q. Why?

A. The structure of an oil seal is such that it is composed of light metal; by light metal I mean thin metal in relation to other parts within or without the assembly. Because of the assembly, be it the cup shaped member to which the sealing element is bonded in any manner or be it the inner shell which is indicated in green, in either instance, this being thin metal, any blows applied to it in the operation of the units results in deformation of the metal parts and damage to the parts, and this damage results in immediate or more rapid failure of the oil seal either in sealing along the shaft or along its outer periphery.

Q. What opportunity have you had to observe the development of oil seals in various uses?

A. Well, I have been in on the oil seal development and manufacture of the product with the Victor Gasket Manufacturing Company since 1935. During that period I spent four years calling on all of very good customers, the purpose in mind being to apply our oil seals in all the various types of applications, so that it became my duty to recommend the application of oil seals, because an oil seal is a specialized item, and we have to be trained in its details; and during those years of visiting the various manufacturers I had an opportunity of studying and observing and installing oil seals in automobiles, trucks, tractors, axles, washing ma-

(Testimony of Albert J. Aukers.)

chines gear cases, stoking units, pumping mechanism, and a host of other items which came to me. In the past 5 years in my position as product engineer, all technical matters, all product applications [172] came to my desk for recommendation or decision, and in those instances of course we received prints, cross section sketches, reports of our field engineers, so that we have at hand very complete data, and in all of the instances great care is taken to protect the seal member from extraneous blows or wear or anything of that kind.

Q. In your experience have you known of any instance where it has been necessary to change the structure of oil seals, that it is protected by any inherent structure from contacting with adjacent moving parts? A. No.

Q. What would happen if it had contacted with adjacent moving parts?

A. To me it would be contacting of two parts that did not have functional value. It means something has to give, something has to wear. Every piece of the seal in contact with any given moving member means that we are rubbing, and we are cutting some part of that member off that is being rubbed upon, and if that falls into the assembly it can cause rapid wear in the gear assembly, or if it falls to the outside it can cause rapid wear of the operating face of the seal and it will leak.

Q. Calling your attention to the structure represented in Plaintiff's Exhibit No. 3, you notice therein many oil seals that are mounted upon some shafts. A. Yes.



(Testimony of Albert J. Aukers.)

Q. In such mountings do you find any contact of adjacent moving parts? A. No, I do not.

Q. What would happen in that specific structure if you did put it against adjacent moving parts?

A. Well, looking at the specific structure, let us say at the portion of the seal that is adjacent to the ball bearing, the channel portion would contact the inner face of the bearing, causing rubbing and friction and wear on that face with metal deposition within the assembly.

Q. Do you know when the Victor Manufacturing Gasket Company first began to make oil seals of Type A or Type H, or either of them?

A. Yes, I do.

Q. When did the defendant first put those on the market?

A. I will have to speak from records.

Q. What records are you referring to?

A. I have before me our record card, identified as Quotation and Selling Records. It is a record card that is maintained in our cost department file.

Q. Is that kept in the regular course of business?

A. Yes.

Q. In the plant and office of the Victor Manufacturing & Gasket Company? A. Yes.

Q. How are they kept?

A. They are kept in definite locations of our cost department and locked every night.

Q. Is that where you obtained that particular card? A. Yes.



(Testimony of Albert J. Aukers.)

Q. I notice you have some other similar cards with you. What are they?

A. That is a carbon copy of the original card, hand copy, just as the original.

Q. Does the card which you hold in your hand—never mind the [174] copies for the moment—disclose and contain a record of the first sales made of either of these types of seals, Type A and Type H?

A. Yes.

Q. What is the first date recorded?

A. The first quotation in selling records is in reference to the oil seal identified originally as SDM 176, which card was later identified with the equivalent number 60,870. On this card I find an entry as follows, the customer, Spicer Manufacturing Corporation, a quotation to this customer on this oil seal in lots of 25 to 500 in graduation. The date of the quotation is June 30, 1936. Do you wish the prices?

Q. Not unless the other side wants them, but I want later to put the card in evidence.

A. Following this quotation we have a record that we received an order for 25 pieces on July 9, 1936, for a specific price. This card refers to our Type A design as identified at that time, or as shown on the devices throughout.

Q. How do you know from the record that is Type A?

A. Well, we have in our engineering department engineering folders in which the records are very

(Testimony of Albert J. Aukers.)

carefully kept of the manufacture of the tools and the number of tools, and design of the product from the tools.

Q. Have you such a one referring to this early beginning?

A. We have on file that record.

Q. Have you the record with you?

A. No. I have another record equally as good.

Q. A record of what?

A. Of the structure of the oil seal and giving the identifying number.

Q. How from that do you know that it was Type A?

A. In one of our very original catalogs we were issuing to our salesmen and some of our good customers—this is merely standard construction of Victor synthetic seals, and on the face are shown the types of seals as designed, and on the lower portion of page 1 is identified the seal number, size and type. Note that after SDM-176 the type A is shown. This catalog is dated July 29, 1936.

Q. When did you make your first sales of the type H?

A. I have here a sales card identified as SDM-191, which is of our type H construction and we have the following note on this card, that we sold the following customer, Richard Wilcox Manufacturing Company quoted on 50 seals on 11/6/36. We received an order from that company for 50 pieces on November 10, 1936.

Q. When was it shipped?

(Testimony of Albert J. Aukers.)

A. I do not have the date here. The date of receipt of order would be crossed out if it was not filled, but I do not have the actual date of shipment.

Q. You said something about the date that the tools were made for the Type A. What can you tell us about that?

A. Well, in the manufacture of our oil seals we of course have to make the necessary tools, the channel tools, the molds, the spring-winding equipment, and after we have all the tools we then make the product, make enough of them to put in stock, so that we can submit the stock to the customer in any manner he desires.

Q. When do you make them?

A. On the Type A we made the tools of the SDM-176 as I remember it during June, 1936; we completed them about two weeks before the quotation date, which was June [176] 30.

Q. Now, on Type H.

A. On Type H, of which I spoke in this record, our SDM-191, we completed the tools on that one in the middle of July, 1936. In that instance we did not have occasion to market it until November.

Q. Do you have a personal recollection of the making of the tools and of the first making and selling of these two types of seals, Type A and Type H?

A. I have a personal recollection of the testing of the product from the tools.

Q. Did you have anything to do with that testing?

A. Yes.

(Testimony of Albert J. Aukers.)

Q. What did you have to do with it?

A. Well, in 1936 I had the job of testing all the oil seals as made from all of the tools. I was the one in fact, who had the job of putting them on the shafts and on the test boxes, recording the data and making the observations, removing the same and making the necessary comments.

Q. Were those tests all made before you made any sales?      A. Yes.

Q. Now, you have referred to certain order and sales records. Will you pick out the ones to which you have made reference?

A. Well, on the first one, being SDM 191, I have Richard Wilcox Manufacturing Company, quantity per quotation and quantity after receipt order.

Q. That is one. In your other?

A. On SMD 176 I have the Spicer Manufacturing Company quotation and order.

Q. By the way, was that the Toledo Spicer Manufacturing Company?      A. Yes. [177]

Q. The same one referred to in the depositions?

A. Yes.

Q. Did you make copies of these for us?

A. Yes.

Mr. Haight: I want to offer these in evidence. Of course, only the originals are admissible.

Mr. Owen: If you tell me that the copies are the same I will take your word for it.

Mr. Haight: Would it be all right to offer the copies in evidence and you check them with the original? They told me they wanted to keep the

(Testimony of Albert J. Aukers.)

original. You can take them when we close today. I will offer in evidence the copies.

Q. Is this the first one you spoke of?

A. SDM 176 is Type A.

Mr. Haight: The one that the witness has just referred to I would like to have marked as Defendant's next in order.

(SDM 176 Type A is marked Defendant's Exhibit AAF.)

[Defendant's Exhibit AAF appears in book of exhibits.]

Mr. Haight: The one that you referred to is what?

A. SDM 191 is Type H.

Mr. Haight: The one that the witness has referred to I ask be marked as Defendant's Exhibit next in order.

(SDM 191 Type H is marked Defendant's Exhibit AAG.)

[Defendant's Exhibit AAG appears in book of exhibits.]

Mr. Haight: With the consent of counsel I am offering these copies in evidence instead of the original.

Q. Now, you referred to some other documents.

A. I have before me the information on the size of seals, with reference to the type, which is dated July 29, 1936.

Q. That is the document that you had reference to as showing [178-9] different types of seals and



(Testimony of Albert J. Aukers.)

from which you read, "Superseded prints prior to July 29, 1936," is it not?      A. Yes.

Q. There are two sheets. What is the second sheet?

A. The second sheet gives the number and the tool size, as well as the type of the seals available at that time for which tools were made.

Q. This was given out at that time?

A. To our salesmen and some good customers.

Q. (By Mr. Owen): At about that date?

A. At that date.

Q. (By Mr. Haight): Type A, the first of these sheets, is a correct representation of the Type A here in question, is it?      A. Yes.

Q. Type H which appears on here is a correct representation of the Type H we are quarreling about here?      A. Yes.

Mr. Haight: This document, consisting of two sheets, the first of which bears the legend "Standard Construction of Victor Synthetic Seals, Victor Manufacturing & Gasket Company, Chicago, Illinois," and at the bottom "Supersedes all prints prior to July 29, 1936," and the second sheet bearing the legend, "Standard Construction of Victor Synthetic Seals" at the top, with the legend at the bottom, "Supersedes all prints prior to July 29, 1936," I offer as Defendant's Exhibit next in order.

(The sheets were marked Defendant's Exhibit AAH.)

[Defendant's Exhibit AAH appears in book of exhibits.]

(Testimony of Albert J. Aukers.)

Mr. Haight: I am advised by Mr. Geppert we have not any copies of these. Would you like to have photostats of these? [180]

Mr. Owen: Yes.

Mr. Haight: May we have the privilege of withdrawing these in order to make photostats for the other side?

The Court: Yes.

Q. (By Mr. Haight): Now, Mr. Aukers, when did you first learn of the Johnson patent in suit?

A. I was advised about it by Mr. Gammie in 1944.

Mr. Haight: Your Honor will recall that the application of the Johnson patent in suit was August 6, 1936, and I shall argue that we were making sales and selling them before application was even made. I am also going to argue later, not now, that a claim here in suit was not inserted in this application until two years later. I think you may cross-examine—Just a moment.

Q. Didn't I ask you, Mr. Aukers, perhaps not, are these Victor seals used on both rotating and reciprocating shafts? A. Yes.

Q. That is true of both Types, Type A and Type H?

A. We do not make the A, but the H we do.

Q. When did you stop making the A?

A. Well, we stopped making the tools for any of the A, to the best of my remembrance, in the latter part of 1939.

(Testimony of Albert J. Aukers.)

Q. Now, you then discontinued Type A and went to Type H? A. Yes.

Q. Was there any reason for that change?

A. Yes.

Q. What were they?

A. As we obtained requests for oil seals [181] from our customers we noticed a definite requirement for a smaller cross section of the seal; in other words, a customer would have a specific shaft size and he would also come to us and say, "I want that oil seal for a given bore size," and in numerous instances when that came about we were unable to manufacture the type A, because the cross section of the seals, the distance required between the shaft in the bore and the housing was too small to permit that, so upon study the form of the internal conical flange permitted the manufacture of the seal with the smallest possible cross section.

Q. In your Type A the distance from the periphery of the seal down to the bottom of the sealing element is greater than the distance between the same structure in Type H, is that the idea?

A. No, that is not exactly what I mean. I mean that you are limited to the range of sizes of oil seals that you can make with this type.

Q. That is A?

A. Because the limited specification on the cross section that you could use, wherein you can use H because you can have the conical flange to reduce the cross section and have a satisfactory seal.

Q. Will you tell the court just a little, I do not

(Testimony of Albert J. Aukers.)

want much detail, as to the various sizes in which these seals are made? Do not give us all about them, just a few illustrations.

A. It is such a large quantity that it is hard to say, but I will hazard a statement of the fact that there are approximately [182] 500 sizes, and it is quite likely that for a given shaft there could be as many as 14 bore sizes; in other words you have, let us say,  $1\frac{1}{2}$  inches for the shaft size, and you might have 14 different bores that a customer would use.

Q. I will be content if you will illustrate with three or four sizes.

A. I believe the best thing to do is quote from a catalog.

Q. Without stopping to quote from the catalog, tell us about from the smallest to two or three or four inches.

A. Well, I can remember that we have some oil seals let us say  $1\frac{1}{2}$  shaft, and we could put 1  $15/16$  inches on the ODT, or 2 inches, and then we could go all the way up to  $3\frac{1}{4}$  or  $3\frac{1}{2}$ .

Q. How about the smaller units?

A. On the smaller units I can remember some seals with a quarter-inch shaft, very small size, and an OD of  $\frac{3}{4}$  of an inch.

Q. That is good enough. They think I do not know what OD means.

A. The outer perimeter of an oil seal is known as OD or outer diameter, the ID would be the inner diameter.

(Testimony of Albert J. Aukers.)

Mr. Haight: In order to ask some more questions in the morning I would not turn the witness over for cross-examination, but I am going to turn him over right now. I don't want to think of any more questions.

Mr. Owen: Your Honor, they have dealt with so many patents here, I think I could condense my cross-examination a good [183] deal if I could work on it tonight and start on it tomorrow the first thing.

The Court: Do you have any more witnesses?

Mr. Haight: I have one more witness, Mr. Gammie, whom I am going to interrogate about the meeting that Mr. Johnson testified to in Chicago, which on direct I should say would not take over two minutes.

Mr. Owen: Why not do that now and I will cross-examine Mr. Aukers in the morning.

The Court: Then would you be able to finish tomorrow?

Mr. Owen: I might be able to, your Honor.

Mr. Haight: Might I ask what your Honor's practice is with regard to the depositions, as to whether we shall read them or consider them read?

The Court: Is there any ruling that would be required of the court in connection with the depositions?

Mr. Haight: No.

The Court: Then I suppose I will have to read them anyhow.



Mr. Haight: I hope your Honor won't suggest that they be read.

The Court: I am perfectly willing that you leave them the way they are and read them.

Mr. Owen: We could call attention to the relevant portions in our brief.

The Court: If you are going to submit any memorandum you [184] can call the attention to the things that you wish.

Mr. Haight: Will your Honor wish argument or briefs, or how do you wish to handle it?

The Court: It does not make any difference to me, whichever way you gentlemen prefer to submit it.

Mr. Owen: I might suggest I think we had better brief the case.

The Court: Maybe we had better wait until all of the evidence is in. Of course, I have not read the depositions.

Do you want to put the witness on?

Mr. Haight: I will be very glad to.

---

EDWARD GAMMIE

called as a witness for the defendant; sworn.

The Clerk: Will you state your name to the court?

A. Edward Gammie.

Direct Examination

By Mr. Haight:

Q. Where do you reside, Mr. Gammie?

(Testimony of Edward Gammie.)

A. Winnetka, Illinois.

Q. What is your occupation?

A. General sales manager for Victor Manufacturing and Gasket Company, Chicago.

Q. How long have you been with that company?

A. Since September, 1930.

Q. In a general way, what was your experience prior to that time?      A. Prior to 1930?

Q. Yes.

A. I was a salesman for a hardware concern.

Q. During the time that you have been with the Victor Manufacturing & Gasket Company have you held different positions?

A. From 1930 to 1935 I worked on industrial business for the company. From 1935 to 1945, that is, May of 1945, I was industrial sales manager for the company in charge of original equipment sales for the company. Since May, 1945, I have been general sales manager in charge of original equipment sales together with replacement sales.

Q. Did you have anything to do with the application of the company's oil seals?

A. Only in so far as the sales are concerned.

Q. In connection with those sales, have you ever known of an instance where they have been used as spacers?      A. I have not.

Q. Have you ever known of an instance where there has been any requirement for any inherent structure to protect it against adjacent moving parts?      A. No.

(Testimony of Edward Gammie.)

Q. You have never known of their being mounted in that way, have you?      A. No.

Q. Did you ever meet Mr. Johnson, the president of the plaintiff company?      A. I did.

Q. When did you first meet him?

A. In May, 1939.

Q. Where did you meet him?

A. At the Union League Club in Chicago.

Q. How did you come to meet him there?

A. I was shown a letter which he had sent to us advising us regarding a seal [186] which he had patented.

Q. There was correspondence which lead to the meeting?      A. Yes.

Q. At that meeting who was present?

A. Mr. Secrist.

Q. Anybody else?      A. No.

Q. You were present?      A. Yes.

Q. Mr. Johnson was present?      A. Yes.

Q. And Mr. Secrist was?      A. Yes.

Q. Mr. Johnson testified that he had three meetings with people in your concern?      A. Yes.

Q. Were you present at any meeting except the one at the Union League Club?

A. The only meeting that I was present was just that one.

Q. Was Mr. Victor present at that meeting?

A. He was not present in the meeting, he did, however, shake hands with Mr. Johnson at lunch.

(Testimony of Edward Gammie.)

Q. Was it after your lunch that you had the meeting and discussion with Mr. Johnson?

A. No, it was before luncheon we had discussion with Mr. Johnson.

Q. And at that meeting there were present Mr. Johnson and Mr. Secrist?      A. Yes.

Q. Is Mr. Secrist alive?

A. No, he is not.

Q. When did he die?      A. In May of 1945.

Q. What was his connection with the Victor Company, if any?

A. He was sales manager for the company in charge of replacement sales. [187]

Q. At that time you were what?

A. Industrial sales manager in charge of original equipment sales.

Q. Did you take part in that conversation?

A. I did.

Q. Did Mr. Johnson?      A. Yes.

Q. And Mr. Secrist?      A. That is right.

Q. Did you make any memorandum of the subject matter of that conversation?

A. I did. Rather, I did not make a memorandum. I collaborated with Mr. Secrist in the making of a memorandum.

Q. When was that memorandum made in relation to the time that you had this meeting and conversation with Mr. Johnson?

A. It was either on the day of the meeting or very shortly thereafter, a day or two thereafter.

Q. Have you that memorandum with you?

A. I have.

(Testimony of Edward Gammie.)

Q. Will you produce it, please? A. Yes.

Q. You have handed me a typewritten document bearing date May 3, 1939, with a typewritten signature of C. C. Secrist. Is that the Mr. Secrist to whom you refer? A. Yes.

Q. Where did you get this memorandum?

A. It has been in my own desk, in my own file.

Q. In your own regular office files?

A. Yes.

Q. Kept in the regular course of business?

A. Yes.

Q. Will you read that memorandum to the court?

A. This memorandum is dated May 3, 1939.

“Conference with Lloyd Johnson of National Motor Bearings Company [188]

“Mr. Gammie and I met Mr. Johnson at the Union League Club to discuss the Johnson patent recently acquired. We pointed out to Mr. Johnson that we were not using his patent construction and that we were considering the purchase of the patent only because of the fact that we are making synthetic oil seals and there might be some advantage in owning the patent. We intimated that we thought it only had a nuisance value as far as we were concerned. Mr. Gammie said that we might be interested in buying the patent for something like \$1500.00 or \$2000.00.

“Johnson said that they were not in the synthetic oil seal business to any extent and that was one reason why he brought the matter to our attention. He said that he was not at all interested in selling



(Testimony of Edward Gammie.)

the patent for \$1500.00 or \$2000.00, which he regarded as 'chicken-feed' and that if the patent was of any worth at all it was worth at least \$10,000.00. He further said that he acted without the approval of his associates in offering the patent to Mr. Victor for \$10,000.00. He said he was not interested in selling the patent for even that amount. He said he preferred to hold the patent with the thought that it might be used for trading purposes later on. He expressed the thought that we would be getting certain patents from time to time and maybe later on arrangements could be made for cross-licensing under such patents if [189] acquired.

"He expressed the thought that he didn't want any more patent litigation because it is highly expensive and even if the case is won it costs so much in time and money that there is no net gain but probably a net loss. He would prefer to use patents for trading purposes, etc.

"He said they had developed a new type of oil seal and that they were more concerned in developing the merchandising of their new seals. He indicated that the new seal could be made on his present type of equipment whereas he only has very limited equipment for making synthetic oil seals.

"Mr. Gammie indicated to Mr. Johnson that he had a tentative appointment with Mr. Lane who would discuss the features of the Johnson patent. However, Mr. Johnson indicated no desire to have such a discussion, and there was no opportunity to

(Testimony of Edward Gammie.)

urge upon him that he talk with Mr. Lane because he indicated that he wasn't interested in selling the patent even at \$10,000.00.

"Johnson said he didn't expect to do anything with the patent at the present time but hold it in his portfolio for future reference, depending on developments in the oil seal business.

"Johnson has been in litigation with Chicago Rawhide recently and the National Company has petitioned the [190] Court to interpret or clarify the license agreement under which National and Chicago Rawhide are working. It seems that Johnson is not satisfied with the restrictions that are put upon him with respect to prices, and he has asked for a Court ruling. However, this litigation has now been settled out of court and signed agreements have been entered into by Chicago Rawhide and National. Johnson said that this agreement included a stipulation to the effect that his company would not make special discounts, rebates, etc., to jobbers; that is, the prices they make would be the same as shown in their price list. This, however, would not apply to the Standard oil seals on which there is a special arrangement with the NAPA.

"Mr. Johnson is anxious that prices be restored to the normal relation with car factory prices, claiming that they are not going to make special deals any more and that they will continue to operate their warehouses. He seemed to feel that it would be entirely legal that all the grease retainer manufacturers would base their prices directly on

(Testimony of Edward Gammie.)

car factory prices; that is, that we would give the jobbers on one-lots a price equal to 60% off the car manufacturer's list price. Then on 10-lots and 50-lots prices would be definitely 5% or some other per cent lower. In that way the grease retainer prices would all be alike. I told Johnson that we were not interested in entering into any [191] price agreements and besides I did not think it was legal. He claimed that his attorney said that prices could be so made because the actual base price is determined not by the grease retainer manufacturers but by the car factories. I also pointed out that car factory discount schedules and trade schedules vary and that we thought it necessary to have the form of our price list sufficiently flexible to meet through the jobber, the various prices made by the car factories.

“One of the reasons for Johnson being in the East is to be available as a witness in hearings before the Senate Committee on amendments to the Wagner Act.”

(Signed) “C. C. SECRIST.”

Q. Is that a true and accurate account of the substance of the conversation that you had on that day with Mr. Johnson?

A. Yes, very substantial.

Q. Mr. Lane is referred to in that memorandum. Who is Mr. Lane?

A. Mr. Lane is of the firm of Parkinson & Lane, patent attorneys.

(Testimony of Edward Gammie.)

Q. Did you have an opinion from him or from that firm in regard to Johnson's patent prior to this meeting?      A. Yes.

Q. Did that opinion have anything to do with your view of the value of that patent?

A. That decided our action.

Mr. Haight: You may cross-examine.

### Cross-Examination

By Mr. Owen:

Q. Mr. Gammie, are you familiar with the B-1175 [192] which is used as a spacer?

A. I am not.

Q. You referred to a meeting in May. You are sure that was not late in April? I note your memorandum dated May 3. Could it have been late in April?

A. It could have been late in April, I presume that it was approximately that date.

Q. You don't know whether it was on Friday, April 28, or Saturday, April 29?

A. Well, it was a week day, I could not say whether it was a Friday or a Saturday.

Mr. Owen: That is all.

Mr. Haight: That is all.

The Court: We will take a recess now until tomorrow morning.

(Thereupon an adjournment was taken until tomorrow, Friday, January 25, 1946, at 10:00 o'clock a.m.) [193]

Friday, January 25, 1946, 10:00 o'Clock A.M.

The Clerk: National Motor Bearing Co. v. Chanslor Lyon.

Mr. Owen: Ready.

Mr. Haight: Ready.

Mr. Owen: Mr. Haight, will you offer the photostats in evidence now?

Mr. Haight: Yes. We have had a copy bound for convenience of the enlarged drawings of certain of the patents referred to, and some that were not referred to by the witness, and I will offer those in evidence as Defendant's Exhibit next in order.

The Court: Very well.

(The photostats of enlarged drawings were marked Defendant's Exhibit AAI.)

Mr. Owen: Mr. Haight and I have also agreed that for the sake of permanency anything that the witness has put on the chart in pencil be made in ink.

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ALBERT J. AUKERS

recalled.

Cross-Examination

By Mr. Owen:

Q. Mr. Aukers, your work with the Victor Company makes you familiar with their various catalogs, does it not?      A. It does.

Q. Do you identify this catalog No. 301 as a catalog put out [194] by the Victor Company?

A. Yes.



(Testimony of Albert J. Aukers.)

Mr. Owen: I offer that as Plaintiff's Exhibit next in order.

The Court: It may be admitted and marked.

(The document was marked Plaintiff's Exhibit 13.)

Q. (By Mr. Owen): Do you also identify this catalog 302 as a similar catalog? A. Yes.

Mr. Owen: I offer it in evidence as Plaintiff's Exhibit 14.

(The document was marked Plaintiff's Exhibit 14.)

Q. You referred yesterday in your testimony to gaskets of all sorts. Does this catalog put out by the Victor Company illustrate the various kinds of gaskets that you referred to? A. Yes.

Q. As well as oil seals?

A. There are oil seal structures in there.

Mr. Owen: I offer that as Plaintiff's Exhibit 15.

(The catalog was marked Plaintiff's Exhibit 15.)

[Plaintiff's Exhibit 15 appears in book of exhibits.]

Q. (By Mr. Owen): Do you have with you a current catalog of the Victor Company similar to any of these that I have offered?

A. I believe they have one on the table, I see one there.

Q. Is that the one with the blue cover?

A. I believe so.

(Testimony of Albert J. Aukers.)

Q. Is this the one to which you refer, No. 303?

A. Yes.

Mr. Owen: I offer that in evidence as Plaintiff's Exhibit 16. [195]

(The document was marked Plaintiff's Exhibit 16.)

Q. (By Mr. Owen): Now, this catalog No. 303 is of the current types of oil seals made by the Victor Company? A. Yes.

Q. By the way, that catalog, in fact, all of these catalogs have pictures. Are you in the pictures in these catalogs, where they show the research lab in the lower right-hand corner of page 3?

A. I am in this picture, yes.

Q. You are in the right-hand upper corner of the picture? A. Yes.

Q. The picture in the lower right-hand corner of page 3? A. Yes.

Q. That picture has appeared in all catalogs beginning about 1937, hasn't it?

A. I have not checked that.

Q. You stated on your direct examination that you called on the trade and are familiar with sales and records of the Victor Company. How many would you say, if you know, approximately, of this type A seal has the Victor Company sold each year, let us start say about 1939. Have you any idea of the approximate production?

A. I have no idea. In my capacity, being field sales engineer at that time, I kept no records of quantity or design in detail.

(Testimony of Albert J. Aukers.)

Q. Have you any idea in any year what the volume of sales of these seals has been by the Victor Company?

A. Of the Victor Company?

Q. Yes.

A. The only remembrance I have was the general statement made to me of the sales in the 1944-45 period of approximately [196] ten or twelve million of all types, sizes and designs.

Q. Have you any idea of the proportion of those as to Type H seal?      A. No, I do not.

Q. You do not have the records with you that would show that?      A. No.

Q. The Type H seal has been quite extensively used by your customers?

A. Yes, with great success.

Q. You do not have any idea of the dollar volume of business in 1944?

A. No, I am an engineer, I am sorry.

Q. You are also acquainted with the various Victor patents, patents taken out by the Victor Company on oil seals?

A. Well, I do not specialize in patents; my job is product engineer, and I only hear of a patent when the management brings it to my attention.

Q. Do you know how many the Victor Company has in the field of oil seals?

A. How many patents in number?

Q. Yes.

A. I could not hazard a guess, I am sorry.

(Testimony of Albert J. Aukers.)

Q. Would you count the number of patents which are shown on page 1 of Exhibit 16?

A. 46.

Q. That was in 1942, was it not?

A. Yes. The catalog is dated September, 1942.

Q. I have a book here of the Victor patents which has 56 patents in it. Are you willing to accept my statement that there are 56 patents of the Victor Company?

The Court: Of what kind? [197]

Mr. Owen: Of oil seals.

A. I have not looked at it, but I am willing to accept your statement.

Mr. Haight: I am willing to accept the statement but I do not consider it has anything to do with this lawsuit.

Q. (By Mr. Owen): Have you ever seen a copy of this patent of the Victor Company No. 2,145,928?

Mr. Haight: I notice that this patent was applied for July 29, 1936. On what theory is this material?

Mr. Owen: This patent is material because Figures 1 to 5 or 6 show the disclosure of the Type A device.

Mr. Haight: Suppose it does? What has a subsequent patent or any patent of the defendant if it is after, or of the manufacturer who is not a party to do with any issue in this case? That sort of inquiry could go on interminably. If you want any authority that it is immaterial I can furnish it if you will give me about five minutes; if that is

(Testimony of Albert J. Aukers.)

allowed in a patent suit there is no limit to where we will go if we inquire into all of the patents of the manufacturer subsequent to anything in evidence in this case; it could not possibly be material, and I object to it.

The Court: You have some purpose in mind?

Mr. Owen: Yes. All I am going to do is call attention to the two patents of the Victor Company that show the structures that are disclosed in them. That is all I have in mind. [198]

The Court: There is no dispute that—I do not think that the defendant disputes that fact that that is the structure——

Mr. Owen: That is not the question.

The Court: They introduced it in evidence first.

Mr. Owen: That is not the question. The purpose here is to show that they had this construction disclosed in one of their patents which issued on the same date that the patent in suit issued, and then under the rules of the Patent Office, I believe it is Rule 94, they are privileged to come into the Patent Office and ask for an interference, and take away a claim which he got which covers the construction which is also shown in this copending case or patent. It so happens that in the Johnson application, which undoubtedly they got a copy of in the patent office, it shows that his date would beat their date, and they did not ask for any such interference. I think it is relevant on the question of the conducting of these negotiations to which Mr. Gammie testified, and the general relationship be-



(Testimony of Albert J. Aukers.)

tween the Victor Company and the plaintiff as to which there was some testimony yesterday. Certainly it could not do any harm.

The Court: It is not quite clear to me just what the pertinency of that is to the issue of infringement.

Mr. Owen: It is not as to the matter of infringement, it is as to these negotiations, it shows a reason why they did not come in. [199]

The Court: You have some thought that there is some connection between that and the conference that took place in Chicago, or some statement that the record shows that the manufacturer had received a patent the same day that the Johnson patent was issued, and that there was no interference between the two in the Patent Office, there was no interference proceeding in the Patent Office.

Mr. Owen: Coupled with the fact that it formed the basis of an interference.

The Court: Subject to the materiality, do you want to stipulate that is the fact?

Mr. Haight: Your Honor, I hesitate not to stipulate to any fact that may be of value, but when we get into a field that is so utterly immaterial I do not want to stipulate. I object to the evidence as immaterial. There is no question about the structure.

The Court: I asked counsel the purpose and he seems to indicate that he wants this as a fact that might in some way or other affect the weight of the testimony with respect to the conference and dis-

(Testimony of Albert J. Aukers.)

cussions which took place in Chicago at this meeting. That is what he said to me to be his purpose.

Mr. Haight: Maybe it is due to my stupidity, but he has certainly not made it clear to me how we came into the discussion at Chicago, at all. Nobody has mentioned it.

The Court: I take it that he is urging this in support [200] of the testimony of Mr. Johnson—am I correct in that?

Mr. Owen: Yes.

The Court: I think I shall allow it for the limited purpose of throwing whatever light it may throw on that—I am not passing on that now—with respect to the weight of the testimony as to these conversations which took place in Chicago that the witness testified to, and in order to save time, with that ruling, would you stipulate to the fact that I have stated?

Mr. Haight: If it will save time, yes; I will let him put in all of the testimony if he wants to; but as far as the illumination is concerned, if I may quote a phrase from John Milton, “It is all darkness and a void.”

The Court: Subject to the statement that the court made, is that a correct statement of the fact?

Mr. Haight: That is all right, let us go ahead with this witness.

The Court: Is there anything else?

Q. (By Mr. Owen): I just want to ask you if Figures 1, 2, 3, 4, and 5 show a structure having the

(Testimony of Albert J. Aukers.)

inset flange with a sealing member molded to it?

A. You ask me as to all the Figures 1 to 5?

Q. Yes.

A. Well, as I look at it the structures Figure 1 and Figure 4 show a structure similar to Type A.

Q. That is enough, as long as I have one. [201]

Mr. Owen: I offer that as Plaintiff's Exhibit 17.

(Patent 2,145,928 is marked Plaintiff's Exhibit 17.)

[Plaintiff's Exhibit 17 appears in book of exhibits.]

Q. (By Mr. Owen): There is just one more patent of the Victor Manufacturing Company that I would like to call attention to, and that is No. 2,240,332, granted April 29, 1941. That patent is similar to your Type H seal?

Mr. Haight: Let me see what the date of it is. What is the date of it?

Mr. Owen: January, 1939.

Mr. Haight: How is that material?

Mr. Owen: That is material on this phase. In its answer one of the defenses is that there was no invention here in view of the state of the art. I want to show by means of this patent and by means of the statements made by the Victor Company to the Patent Office which resulted in the granting of this patent that they took there a position that it was invention, and here they are telling the court that it was no invention; in other words, they are taking inconsistent positions, in one place to convince the Patent Office so they could

(Testimony of Albert J. Aukers.)

get a patent, and here so that they can convince the Court there was no invention in what they argued was invention there.

The Court: Do you object to this?

Mr. Haight: I certainly object to it.

The Court: I think the objection is good.

Mr. Haight: That conversation in Chicago was not in 1936, [202] that was in 1939, and you will remember the evidence yesterday that we were putting these on the market, not the defendant, but the manufacturer was putting them on the market prior to the application date of the patent in suit. That goes back to 1936. The conversation was in 1939.

Mr. Owen: Your Honor, along with the offer of that patent I also want the record to show that I wish to offer the file wrapper, which shows the argument put up by the Victor Manufacturing Company to convince the Patent Office to grant that patent, so that my exception will also include an offer of the patent and the file wrapper.

The Court: You may have the file wrapper marked and the patent marked for identification if you wish to show what you offered.

Mr. Haight: I object to that also, that has been thoroughly passed upon by the Supreme Court, and there is no such thing as invention in a patent by estoppel. That has been repeatedly ruled upon by the Supreme Court.

(The patent No. 2,240,332 is marked Plaintiff's Exhibit 18 for Identification, and the File Wrapper Plaintiff's Exhibit 19 for Identification.)



(Testimony of Albert J. Aukers.)

Q. (By Mr. Owen): Now, Mr. Aukers, I want to refer to the patent in suit and to the way in which a sealing member of that sort is made. It is true, is it not, that looking, for instance, at Fig. 5, you take the male member which you have colored red, which is the cup member, and you have a female mold into which that is inserted, is that correct? A. That is right.

Q. And then you place into the mold a sufficient amount of composition so that when the male member of that mold is squeezed down on it and the mold defines the shape of the sealing member, there is just the right amount of composition in there to fill the mold?

A. No, it is not right in the fact that you have a little more than the right amount.

Q. So that it will squeeze out through the edge for the beginning operation? A. Yes.

Q. Generally speaking, the perfect operation will be to fill it exactly right?

A. That would be the ideal one.

Q. Then the male member is closed on the mold and it is put into a hydraulic press, which is the type of presses that are shown in the lower right-hand corner of the page of the catalog Exhibit 16?

A. That is the type of press in which the molding operation is done.

Q. Then as a result of that curing in a mold under the heat and pressure the composition that was put in there in an uncured state assumes a



(Testimony of Albert J. Aukers.)

definite form and consistency and secures itself to the cup member. That is correct, is it not?

A. It is not.

Q. What is incorrect about it?

A. The fact of the matter is the molding of the two members does not secure a bond to the inwardly offset radial flange. Preparation of the [204] flange is necessary.

Q. With that correction, that is right?

A. Yes.

Q. That is true also in the device that would be secured in a mold in a similar way in Pennick?

A. It would.

Q. That is also true of Frumweller, that would be secured in the mold, too, wouldn't it, in a similar way?

A. It would.

Q. That is also true in the case of Miller, 2,004,669, in Figure 5?

A. Figure 5 and Figure 7 as well.

Q. Now, all of the other patents to which you referred yesterday, of which Fitzgerald is an illustration, No. 1,983,746, rely upon a vise-like mechanical clamp with the possible exception of your Peterson patent, that is correct, is it not?

A. The bonding is obtained by the clamping between the radial faces.

Q. What you have called a bond here in your testimony?

A. Yes.

Q. It is a physical manipulation of clamping like a vise? It is a bonding between the two mechanical case members, they are squeezed together

(Testimony of Albert J. Aukers.)

and they hold the leather sealing element, or it may be a synthetic sealing element?

A. That is the method of bonding.

Q. In the Peterson patent in the Figure down here that union is made there with cement, in other words the sealing element which is made?

A. The synthetic sealing element is made separate in one mold, it is united with the case separately, in an entirely separate operation. [205]

Q. Mr. Aukers, in all of this maze of prior art to which you have referred yesterday, what do you consider to be your single best reference?

A. I have looked through the patents that I testified to yesterday, and I cannot truthfully give you any single one. Comparing these in my mind with the Johnson patent, I looked at the Gits, and that is definitely a good one; I looked at the Chandler, and that is a good one; I looked at the Winter, and that is a good one, and here is Fitzgerald.

Q. What other ones would you like to include?

Mr. Haight: Before this line of interrogation goes too far, I have not offered this witness as an expert. I have my own idea on these references. I called this witness to describe the structure, and I don't know whether I am going to agree with his answers, or not. I do not consider him competent to pass upon the question of which is the best reference. If counsel wants to interrogate him, all right, but I am just cautioning you it does not mean very much to me. He is not that type of witness.

(Testimony of Albert J. Aukers.)

Q. (By Mr. Owen): Have you any others?

A. Did I mention Fitzgerald?

Q. Yes, you mentioned him, Gits, Fitzgerald, Winter and Chandler.

A. Frumweller, and you also had Heinze.

Q. Which Heinze? A. 403.

Q. That is 2,071,403?

A. Yes. Lord, Anderson, and Heinze [206] 2,116,240. I believe those are all that I remember.

The Court: We will take a brief recess.

(Recess.)

Q. (By Mr. Owen): Mr. Aukers, in your testimony yesterday you said that Pennick, 1,817,095, shows the sealing member bonded to both sides of the projection 11' in Figure 2 and to the projection 11 or 10 in Figure 1, is that correct?

A. 11 and 10 in Figure 1, are equivalent to 11' as shown in Figure 2. That is the molded resilient member.

Q. It is bonded to both sides of it? A. Yes.

Q. That is true also of Miller, is it not, 2,004,669, Figure 5, that is bonded to both sides?

A. Yes.

Q. So that in that particular Miller is like Pennick? A. Well, Pennick—

Q. Answer my question "Yes" or "No" and then you can explain. A. Yes.

Q. Now, I call your attention to Frumweller 1,617,587, which you have colored Figure 5, that shows the sealing member bonded to both sides of the flange similar to Pennick, is that correct?

A. Yes.

(Testimony of Albert J. Aukers.)

Q. Did you know that the Patent Office cited this Pennick reference before it granted the patent in suit? A. I don't know what you mean.

Q. Did you know that the Patent Office cited this Pennick patent as a reference before they granted the patent in suit? [207] A. No.

Q. Now, I call your attention to the Chandler patent No. 1,905,800; that has the radial offset cup flange 18, doesn't it?

A. It has an axially inward offset radial flange 18.

Q. And the operation of the Chandler seal is to clamp the leather or synthetic sealing member in a little groove or pocket by means of a physical device, a locking action of the parts; that is correct, is it not? A. The operation——

Q. Will you please answer "Yes" or "No?"

A. Yes. However, the operation is one of bonding by clamping.

Q. You prefer to call it bonding, it does not matter what you call it, the fact is that it is gripped in there with a vise-like action, isn't that right?

A. Yes.

Q. Now, in the patent in suit, let us look here at Figure 5. The case member has the peripheral portion and the inwardly offset flange, and that is similar to the case member of Figure 3 of the Chandler patent in that regard, is it? A. Yes.

Q. And looking at Figure 3, that case member there has the peripheral portion and the radial inset flange similar to Chandler, that is correct, is it not? A. Axially, yes.



(Testimony of Albert J. Aukers.)

Q. Now, you said that Fitzgerald was another illustration of the offset flange. I call your attention to Figure 1, where you have the case with the peripheral portion and the inwardly offset flange; that is similar to the one in Chandler, [208] Figure 3, is it not?

A. Yes, both of them have axially inwardly offset radial flanges.

Q. Now, in Frumweller, I call your attention to the portion marked 45, which you have colored red, and while that is not a radial flange it is an offset axial flange, is it not?

A. No, that is an inclined flange looking at the view from Figure 1, in the way I look at it it is an inclined flange connecting axial portions of the flange.

Q. And it has a similar shape to the flange in Figure 3 of Chandler, does it not? A. Yes.

Q. So in that particular Chandler and Frumweller are alike?

A. In that particular, yes.

Q. Now, in the prior art patent to Larsh, 2,000,341 in Figure 3 you find the radial flange with a setoff portion, isn't that correct?

A. That is right, it is a radial flange with an offset portion connected by an inclined plane.

Q. That is also true in Figure 7?

A. With the offset radial flange connected by an inclined plane.

Q. In that regard they are similar to Figure 3 as to inwardly set flange portion of Figure 3 of Chandler? A. Yes.



(Testimony of Albert J. Aukers.)

Q. I call your attention to the Anderson patent, which shows a method of producing oil seals and in describing that method they also show an oil seal between these extended guides, which, as I believe you said, was an inwardly offset—

A. Axially inwardly offset radial flange. [209]

Q. And in that respect that is similar to Figure 3 of Chandler? A. Yes.

Q. Now, referring to Heinze No. 2,071,403, I believe you found in the disclosure of that patent an inwardly offset flange? A. Yes.

Q. And that is similar, then, to Figure 3 of the Chandler patent? A. Yes.

Q. Now, the Winter patent, No. 2,089,461, I believe you gave that as another illustration of an inwardly offset flange?

A. Figure 5 has the axial inwardly offset radial flange.

Q. That is similar to Figure 3 of Chandler, is that correct? A. Yes.

Q. Now, I call your attention to Figure 5 of the Peterson patent, No. 2,114,908, and there you have given a case member with a peripheral portion and an inwardly offset radial flange?

A. Yes.

Q. That is similar to Figure 3 of the Chandler Patent? A. Yes.

Q. Now, yesterday you referred to the Heinze patent No. 2,116,240, and particularly to Figures 3, 6, 7, and 13. Would you look there and see if you find in Figures 3, 6, 7, and 13 the cup member with

(Testimony of Albert J. Aukers.)

its peripheral portion and its inwardly offset radial flange?      A. I do.

Q. That is similar to the Chandler Figure 3?

A. Yes.

Q. Do you know whether or not this Chandler patent was cited [210] by the Patent Office before granting the patent in suit?

A. No, I do not.

Q. Now, I want to take up this Frumweller Patent, 1,617,587. The patent shows here as I believe you said a face type of seal pressing the seal against the cylindrical face of the ball?

A. It does.

Q. In that type of seal the member 48 pushes the seal, itself, axially along the longitudinally long shaft, doesn't it?      A. That is correct.

Q. In this Frumweller construction the resilient member, which you read, as an annular flexible diaphragm, that is the part which is 43——

A. (Interrupting): There are two resilient members in Figure 5.

Q. I am talking about the one you read from the claim that is called annular flexible diaphragm, that is 43?      A. That is right.

Q. That is anchored in this housing at its outer edge so that with the pressure of the spring pushing axially along the shaft it shoves this sealing member against the ball?      A. That is correct.

Q. Now, then, would you apply an arrow in the direction of that force which is applied? I will give you a colored pencil.

(Testimony of Albert J. Aukers.)

A. The force is applied longitudinally.

Q. Will you put that right out in the ball so it will show that is the direction of the sealing member against that ball? [211]

A. This is the direction of the spring pressure against the steel diaphragm which presses the sealing member against the ball.

Q. Now, in giving your definition yesterday of your color scheme you said that you used blue, I think it was, for the resilient rubber sealing member, whether rubber or leather. That is correct, is it not?

A. I identified it as Item 41.

Q. 41? A. Yes.

Q. It is all colored blue?

A. That is right.

Q. Now, why was it that you extended that blue color and took in the seal 46 that is around the outside of that resilient sealing member? Do you know what 46 is?

A. 46 is the metal sheath as is described in reading the patent specifications.

Q. That is not flexible, is it?

A. It, in itself, is not.

Q. It is a cylindrical metal member?

A. Yes.

Q. Why did you color it blue, then, and not red, like you colored the other portion?

A. The only answer to that that I can say is, I am not concerned with the resilient member, and thought that the description from the specifications would explain 46 satisfactorily.

(Testimony of Albert J. Aukers.)

Q. You did not illustrate it correctly, did you, with the color as far as the color is concerned?

A. No, but I did not think it had any pertinency on the bonding that I was showing.

Q. Do you mind correcting this drawing so it conforms to the [212] facts by just writing off to the right, "Metal sheath should be colored red?"

A. Yes.

Q. Now, the operation of this Frumweller device as shown in Fig. 5 is that the periphery is a longitudinal periphery and it is forcing the sealing material 41, which is inside of the metal sheath 46, so it cannot flex against the ball face 3. That is correct, is it not?

A. The explanation is incorrect to one extent, and that is though 41 cannot flex it can be displaced upon the periphery longitudinally.

Q. Depending upon how heavy and thick rubber it is, and the composition of the material entirely?

A. The pressure would make it displace.

Q. But in the operation of the device, in the normal operation of the device there would be in view of the sheath of 46 there would be no flexing of the sealing member 41 with relation to the flange to which it is attached?

A. No, it would be longitudinal.

Q. Now, you testified yesterday, in talking about this Frumweller reference, that that could be used to seal a shaft. Do you remember that testimony?

A. That it could be used to seal a shaft—I don't remember whether I said that.

(Testimony of Albert J. Aukers.)

Q. You said instead of a ball member? Would you just show us how you are going to reconstruct from Frumweller to make the seal as shown in Figure 4?

A. You would have to rotate the structure 90 degrees and then you would have a structure [213] such as this.

Q. What you are doing then is taking the resilient member 43 and *being* it over to form a peripheral portion of it?

A. That is right, and you have an outer peripheral portion, the cup bottom, axially inclined portion and radial portion, here. This is the inclined portion and then, of course, the molded resilient material is bonded to both sides of the radial portion and inclined plane.

Q. Then you are taking off that 46, aren't you?

A. I am.

Q. You do not want it. What are you going to provide in the way of a spring to keep that from pressing on the shaft?

A. That has a good deal of spring.

Q. So you would have to reconstruct the ball to make it a shaft?

A. No, only change the axis.

Q. More than that, you have provided additional parts, haven't you?

A. No, I mentioned in the beginning that by rotating it 90 degrees, then having the metal portion here, it will become a periphery portion, and having this base it would become a cup bottom, and



(Testimony of Albert J. Aukers.)

this portion would become an inclined plane, and then the radial portion, and then all we do is take the sealing element and bond it to both sides of the radial flange. That, in itself, could be a seal.

Q. Then when this has been reconstructed you would put the seals now on the shaft instead of just straight along the axis of the shaft, that is correct, is it not?

A. Not necessarily. [214] As I see it, the force of the sealing element is 90 degrees, that is the only difference, you see you put the seals along the same face as you have in the longitudinal curve, in other words in rotating it you put it on the shaft, and it would just be the curve that you see here, the shaft would be in this direction.

Q. You have just shown a representation of a shaft there.

A. That is a representation of a shaft, so you still deal with the same phase of the construction shown in Figure 5, and you rotate it at 90 degrees.

Q. But as shown in this patent it would not be operative with these changes to seal the shaft?

A. It would be operative.

Q. With the changes that you have made to seal the shaft?

A. You could have it sealed both ways, but I would prefer the change; I am explaining, I could visualize a shaft on this having an extension.

Q. You are drawing now a shaft right through the middle of Figure 4?

(Testimony of Albert J. Aukers.)

A. Right through the middle of Figure 4, and part of the shaft is a conical job, a round job, as shown here, and the sealing element of the seal on the inclined plane of the rotated shaft.

Q. Then you are going to amputate this ball 3 as part of the shaft and have a special shaft made to fit the seal, is that correct?

A. In this instance, yes, though you could have both [215] types of shaft with the same basic design as Figure 5.

Q. Now, this device of Lord, No. 1,996,210, is for a vibration mounting member, is it not?

A. That is correct.

Q. That is not an oil seal?

A. It is not an oil seal.

Q. Nor is it an air seal?

A. It is not an air seal.

Q. It would have to be changed and reconstructed if you were going to make an oil seal out of it, wouldn't it? A. It would.

Q. The Victor Manufacturing Gasket Company does not manufacture this device of the Lord patent, does it? A. We do not.

Q. Does the plaintiff manufacture any such device? A. Who is the plaintiff?

Q. The National Motor Bearing Company.

A. I don't know.

Q. No oil seal manufacturer that you know of does make these devices, does he?

A. I could not answer that, I have not investigated that phase of it.

(Testimony of Albert J. Aukers.)

Q. The device of this Peterson patent No. 2,114,-908, which is owned by the company for whom you work, has never been sold commercially, Figure 5?

A. Not to my knowledge.

Mr. Owen: That is all.

Mr. Haight: There is no redirect examination, if your Honor please. As far as I am aware, that is the close of the defense. [216]

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### LLOYD A. JOHNSON

recalled as a witness by Plaintiff in rebuttal, having been previously sworn, testified as follows:

#### Direct Examination in Rebuttal

By Mr. Owen:

Q. Mr. Johnson, have you studied the various patents which are cited by the defendants in this case?

A. Yes.

Q. Are you familiar with those constructions?

A. Yes.

Q. Have you ever given testimony before in a patent case involving oil seals?

A. Yes.

Q. Whereabouts?

A. In New York and San Francisco.

Q. When was the New York case?

A. 1935, I believe.

Q. When was the case here in San Francisco?

A. About two years ago.

Q. Do you remember what judge it was before?

(Testimony of Lloyd A. Johnson.)

A. I am sorry, I can't remember his name; it was a Federal judge.

Q. Was it Judge Roche? A. Yes.

Q. I believe you were asked on cross-examination about the date when you made the invention of the patent in suit. Do you have anything to show or refresh your recollection as to when you invented the seal in suit? A. Yes.

Q. What do you have there, Mr. Johnson?

A. I have a blueprint.

Q. What does it show?

A. It was drawn on May 23, 1935 by Hall H. Klein.

Q. Who was he?

A. He was our testing engineer at the time this drawing was made.

Q. Did you have anything to do with the making of that drawing? [217] A. Yes.

Q. What did you have to do with it?

A. I had previously made a sketch of this seal in question and instructed Mr. Klein to make a sketch of it, and then supervise the testing of the seal.

Q. Do you have the original tracing from which that blueprint was made? A. No.

Q. Do you know where it is? A. No.

Q. Where did this blueprint come from, do you know?

A. It came from your office, I guess. We sent it to you.

Q. Do you know when it was sent to me?

(Testimony of Lloyd A. Johnson.)

A. It was received by you on September 13, 1935.

Mr. Owen: Mr. Haight, if I were called as a witness I would so testify, it has my office date stamp on it.

Mr. Haight: All right.

Q. (By Mr. Owen): What is the construction shown on that blueprint?

A. It is similar to Figure 5 of patent 2,146,677.

Q. That is the device in suit? A. Yes.

Mr. Owen: I ask that the blueprint be marked Plaintiff's Exhibit next in order.

Mr. Haight: Will you reserve offering it until I have an opportunity of interrogating him?

Mr. Owen: I will ask that it be marked for identification.

(The blueprint is marked Plaintiff's Exhibit 20 for Identification.)

Q. (By Mr. Owen): Following the making of that sketch what else [218] was done in regard to that seal, if anything?

A. Well, we made the seal and tested it.

Q. Were any drawings made in the factory?

A. Oh, yes.

Q. Do you have any of those?

A. Yes, I have four here.

Q. What are these?

A. These are original drawings of the same type of seal as shown in Figure 5, which is Drawing EX314.

Q. What is the date on that drawing EX314?



(Testimony of Lloyd A. Johnson.)

A. August 13, 1935. Then there are three more drawings; two of them, EX315, EX316, are mold drawings, and EX317 is the outer case drawing, which is similar to the outer case shown on Figure 5. These are blueprints of those drawings.

Q. Where did these tracings, the originals of which are in your hand, come from?

A. Out of the engineering files of the National Motor Bearing Company.

Q. Do you know when they were taken out?

A. Just recently, in the last ten days, or so.

Q. For the purpose of this case? A. Yes.

Q. Are those files regularly kept by the National Motor Bearing Company? A. Yes.

Q. What is the date on the mold drawings EX315 and 316?

A. August 21, 1935, on both of them.

Q. Were molds actually made and was a seal made according to those drawings? A. Yes.

Q. Do you have it? A. Yes.

Q. Would you please produce it?

A. Here is the seal. [219]

Q. What is that seal like, which drawing?

A. Drawing EX314.

Q. That is an assembly drawing? A. Yes.

Q. Wherein does it differ from that drawing EX314?

A. I don't know that it differs, except that the outer case on the edge of the outer case, near the wiping lip, it has no coil spring. Otherwise it is the same.

(Testimony of Lloyd A. Johnson.)

Q. That does not affect the operation?

A. No.

Q. What are the facts about the making of that seal?  
A. This seal was made and tested.

Q. Have you any data there that shows when it was made or tested? What are you reading?

A. I have a tag that has been attached to the seal ever since the test.

Q. What does it say on the back?

A. Metal Heel Hermetik subjected to continuous testing from 9-9-35 to 10-7-35. It is also dated 10-7-35. On the other side of the tag it says, "See Test report #109 for details."

Q. With respect to that date of 10-7-35 in the upper left-hand corner of the tag, what does that indicate?

A. That indicates the conclusion of the test.

Q. And on the other side of the tag about the Test #109, were you able to find that test?

A. No, I was not.

Q. Are you able to account for why you could not find it?

A. This test report, along with quite a few others, has been lost in the moving, when we lost a lot of other samples. [220]

Q. Your testimony the other day was that you had made quite a few of these sample seals. How many of those were you able to find when I asked you to look for them recently?

A. You mean of this particular type of seal?

Q. Of this particular seal right here, made

(Testimony of Lloyd A. Johnson.)

according to this drawing EX314. A. One.

Q. And do I have a copy, I mean one like it, in my office? A. Yes.

Q. I hand you a seal with a tag on it which shows with a rubber stamp, "From Law Office of A. Donham Owen, Patent, Trade-Mark, Unfair Competition and Copyright Exclusively, 950 Russ Building, San Francisco, Received September 27, 1935," and alongside of it are my initials, which I put there on that date. On the tag of the seal can you read that and tell whose handwriting that is on the back of that tag?

A. It is dated 9/26/1935, "Sample for Mr. Owen. Metal case Hermetik Soft lip molded or bonded metal case or heel."

Q. Was that seal made in the same mold and at the same time as the one which you previously made? A. Yes, with the same tool.

Mr. Owen: I offer in evidence as Plaintiff's Exhibit 21, the seal about which Mr. Johnson testified, and as Exhibit 22 the one which was in my office.

Mr. Haight: I suppose they are admissible.

(The seals were marked Plaintiff's Exhibits 21 and 22 in evidence.) [221]

Q. (By Mr. Owen): Now, Mr. Johnson, I want to call your attention to Exhibit 20 for Identification and to the statements appearing on there and ask you to explain what they mean. First, read the statements on there and explain them.

A. "New type Hermetik metal ring heel."

(Testimony of Lloyd A. Johnson.)

Q. The statements I am interested in are those two last lines.

A. "First seal of this type made 9/28/35. First installed in machine 9/4/35."

Q. According to that statement you are installing them in a machine 24 days ahead of having made the first one. How do you explain that, and I hand you back the seal which you have produced with the tag on it.

A. The only logical explanation I have of this conflict of dates is the fact that Mr. Klein evidently wrote the figure "9" for September when he should have written August. The seal, itself, with the tag that has been on it, is dated 9/4/35, at the beginning of the test, so obviously it had to be made before it could be tested. The lapse of time of six to seven days between August 28 and the day the seal was first tested is about the time it took to make the seal.

Q. Referring to the date on the molds that were used in making that seal, does that give you any clue?

A. Yes, the mold drawings are August 21.

Q. And about how long would it take to have those molds made?

A. A day. [222]

Q. About how long?

A. One day.

Q. You testified the molds were so made.

A. Yes.

Mr. Owen: Mr. Haight, are you agreeable to using blueprints for these originals?

Mr. Haight: Certainly.

(Testimony of Lloyd A. Johnson.)

Mr. Owen: I will offer as Plaintiff's Exhibit 23 the four blueprints No. EX314, dated August 13, 1935, EX315, dated August 21, 1935, EX316, dated August 25, 1936, and EX317 dated 8/13/35, all to constitute one exhibit.

(The blueprints were marked Plaintiff's Exhibit 23.)

[Plaintiff's Exhibit 23 appears in book of exhibits.]

Mr. Owen: Now, Mr. Haight, how about Exhibit 20 for Identification?

Mr. Haight: I think you had better offer it.

Mr. Owen: All right.

The Court: It may be admitted.

(Plaintiff's Exhibit 20 for Identification was admitted in evidence.)

[Plaintiff's Exhibit 20 appears in book of exhibits.]

Mr. Owen: Reference was made yesterday to the Chicago conversations that you had, one of which I believe was attended by Mr. Gammie.

A. Yes.

Q. He said he invited you to go and talk with Mr. Lane, who was the Victor Manufacturing Company patent counsel. Did you go and talk to Mr. Lane?

A. No.

Q. Why did you not?

A. The conversations I had with the men of the Victor organization in negotiating with them indi-



(Testimony of Lloyd A. Johnson.)

ated [223] that they wished to depreciate this patent of ours, and I felt by talking to their attorney would only subject me to more hammering down on the patent, and I saw no purpose in going to see him.

Q. I believe you testified you had come down on your royalty from 5 per cent to 2 per cent.

A. That is right.

Q. Now, as Mr. Aukers used the word "bonding" in his testimony yesterday and today, is that the way the word is used in the oil seal art?

A. No—with respect to certain of these patents, it is with some.

Q. Now, with respect to Pennick, Frumweller and Miller, and the patent in suit, that is the correct use of the word bond?      A. Yes.

Q. In the other patents to which Mr. Aukers has referred, where he called it bonding, is that word used in any of those patents?      A. No.

Q. How is it referred to in the art?

A. I have a book of patents, here, and I could call them off if you wanted me to.

Q. Where you have devices like the Chandler patent No. 1,905,800, what type of connection is that called?

A. In the nomenclature of the oil seal business that is usually referred to as clamping, that is the machanic's term to distinguish between a clamping and bonding. In our company we make quite a few types of seals where the seal members are held by clamping. [224]

(Testimony of Lloyd A. Johnson.)

Q. In getting out your patent before the Patent Office did you have anything to say to the Patent Office about this matter of bonding? A. Yes.

Q. Will you read what you said?

A. "The Pennick reference is of no greater value than Walker as showing that bonding is not new. As before stated, the basis on which the present case rests is believed to be one of structure of the various parts entering into the seal."

Mr. Haight: What page are you reading from?

A. Page 17.

Mr. Owen: Page 17 of the File Wrapper, which is Defendant's Exhibit AAA.

The Court: We will take a recess until two p.m.

(A recess was taken until two o'clock p.m.)

#### Afternoon Session

Friday, January 25, 1946, 2:00 P.M.

The Court: You may proceed.

Mr. Owen: We seem to be hurrying and we will try to finish this afternoon as Mr. Haight can make his train tomorrow.

LLOYD A. JOHNSON

recalled: previously sworn.

Direct Examination

(Resumed)

By Mr. Owen:

Q. Mr. Johnson, you stated in your examination this morning that the Exhibit 21, the seal which